

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

WILLIAM A. IZZARD,
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**

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

WILLIAM A. IZZARD,)
)
 Appellant,)
)
 v.) Vet. App. No. 15-4154
)
ROBERT A. MCDONALD,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

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

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

ISSUE PRESENTED

Whether the Court should affirm the September 2, 2015, Board of Veterans' Appeals (Board or BVA) decision that denied entitlement to an initial evaluation for post-traumatic stress disorder (PTSD) in excess of 10 percent prior to June 14, 2012, where the Board's findings are supported by the record, they are not clearly erroneous, and they are adequately explained.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the BVA.

38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

William A. Izzard, hereinafter “Appellant,” appeals a September 2, 2015, Board decision, wherein the BVA denied entitlement to an initial evaluation for PTSD in excess of 10 percent prior to June 14, 2012.¹ (Record Before the Agency (R.) at 1-20).

C. STATEMENT OF FACTS

In April 2008, Appellant filed an application seeking service connection for, *inter alia*, PTSD. (R. at 629 (617-32)). In support of his claim, he submitted a statement in May 2008 noting that he has had stress related issues since returning from Vietnam, and that it had become worse over the last 18 months. (R. at 519 (519-22)). He had nightmares and experienced “anxious ‘butterflies’” and tingling in his chest. (R. at 519). He also reported being easily startled, easily irritated, and not being effective on job interviews. *Id.*

Appellant’s spouse also submitted a statement in May 2008 indicating that Appellant had been worse in the last 18-24 months. (R. at 517 (517-18)). She reported that Appellant had lost his job in November 2006 and had been unemployed since that time. (R. at 517). She indicated that Appellant was obsessed and stressed about his war experiences and that he hardly slept, was less patient, and easily startled. (R. at 517). Appellant’s wife also noted that

¹ Appellant has limited his appeal of the Board’s decision to the above-mentioned claim. Thus, he is not contesting the Board’s denial of entitlement to (1) a rating in excess of 50 percent for his service-connected PTSD after June 14, 2012, or (2) service connection for a back disorder. Thus, Appellant has abandoned any appeal therefrom. See *Bucklinger v. Brown*, 5 Vet.App. 435 (1993).

Appellant had informed her of difficulty and nervousness during job interviews. *Id.*

Appellant underwent a VA medical examination in September 2008. (R. at 426-34). The examiner elicited information concerning Appellant's personal, military, employment, and medical histories. (R. at 427-31). Appellant noted being in his current marriage since November 1973 and indicated that they never had a fight and he'd never "laid a hand on her" or gone to bed mad, although they had argued. (R. at 428). He also reported he worked successfully in sales from 1970 to November 2006 when the job that he was working in was eliminated. (R. at 431). He was hired with another company in April 2008 and stated he had difficulty getting a job because "he felt that there was clear age discrimination." (R. at 431). Appellant reported symptoms of nightmares, being easily startled, easily emotional, depressed, anti-social, and experiencing tingling in his stomach and chest. (R. at 431).

On objective examination, Appellant was found to be cooperative, pleasant, neatly dressed, and groomed. (R. at 432). Appellant denied any visual, auditory, or tactile hallucinations, any obsessive thinking or compulsive behaviors, and any suicidal or homicidal ideation. *Id.* His concentration was unimpaired. (R. at 433). His affect was considered to be mildly anxious. (R, at 432). Appellant reported feelings of hopelessness related to his financial situation. *Id.* Appellant denied any irritability and symptoms of mania or a panic disorder. *Id.*

Appellant reported a good energy level and enjoyed cooking, yard work,

and playing chess. *Id.* Socially, he reported being close to his wife, three children, brother, and his sister-in-law. (R. at 433). He estimated having between 6 to 8 friends and that he did not have any issues with authority figures. (R. at 433).

The VA examiner found that Appellant had a markedly diminished interest in significant activities and had persistent symptoms of increased arousal in the form of difficulty with sleep, hyper vigilance, and exaggerated startle response. (R. at 433). The examiner diagnosed PTSD. (R. at 433). The VA examiner also noted that the depression and anxiety that Appellant experiences were a result of the combined factors of his PTSD and financial worries. (R. at 434). The examiner also opined that Appellant's PTSD symptoms had no negative impact on his ability to obtain and maintain physical or sedentary employment, and that it caused minimal interference with his social functioning. (R. at 434).

In September 2008, the VA Regional Office (RO) issued a rating decision granting service connection for PTSD and assigned non-compensable rating effective April 23, 2008, the date of Appellant's claim. (R. at 414-23). Appellant filed a notice of disagreement (NOD) in March 2009. (R. at 409-10).

Subsequently, Appellant submitted additional evidence in support of his claim. This included March 2009 correspondence from Appellant's readjustment counseling therapist, Ms. Dannon Tarpley, at the VA Hyannis Vet Center. (R. at 403-08). Ms. Tarpley's letter noted that Appellant experienced sleep disturbance, irritability, anhedonia, problems with concentration, anxiety,

hypervigilance, intrusive thoughts, and nightmares. (R. at 403). Appellant reported that his PTSD symptoms negatively impacted his family and social relationships. (R. at 405). Ms. Tarpley opined that Appellant had moderate social and familial impairment as a result of his PTSD. (R. at 407).

An April 2009 VA treatment record was also obtained. (R. at 373-83). On this date, Appellant reported being semi-retired, collecting Social Security, and working full time. (R. at 374). Appellant endorsed mood swings, insomnia, irritability, and that he was easily agitated and aroused. (R. at 374). He denied suicidal ideation, but he reported thoughts of suicide 6 months ago after he was thinking of his financial problems. (R. at 374). On examination, Appellant did not have any issues with appearance, general behavior, perception, cognitive functioning, or thought pattern or content. (R. at 381). The examiner noted that Appellant was angry/irritable and anxious. (R. at 382). Overall, the provider found that Appellant had “mild” PTSD. (R. at 382). The examiner specifically noted that Appellant had mild anxiety and depression. (R. at 382).

In May 2009, the RO issued another rating decision and a Statement of the Case (SOC) increasing Appellant’s PTSD rating to 10 percent, but no higher, effective the date of claim. (R. at 351-70, 777-87). Appellant submitted a substantive appeal in June 2009. (R. at 331-36).

In May 2011, the Board initially considered Appellant’s claim regarding his PTSD evaluation and remanded for further development, including obtaining an additional VA examination. (R. at 269-83). In June 2012, Appellant attended

that additional examination. (R. at 197-205).

In July 2012, the RO issued another rating decision and a Supplemental SOC (SSOC) continuing Appellant's 10 percent disability rating for his service-connected PTSD prior to June 14, 2012, and increasing his rating to 30 percent thereafter. (R. at 173-78, 179-92). The Board remanded Appellant's claim in February 2014 for further development, including obtaining potentially relevant documents. (R. at 141-45). In July 2014, the RO issued another rating decision and SSOC continuing Appellant's 10-percent rating for PTSD prior to June 14, 2012, and increasing his rating to 50 percent thereafter. (R. at 38-44, 48-62).

In September 2015, the Board issued the decision on appeal. (R. at 1-20). In its decision, the Board reviewed all the relevant treatment records and examination reports and found that, for the period prior to June 14, 2012, Appellant had anxiety, sleep disturbance, and irritability. (R. at 13). The Board noted that the evidence showed that Appellant was able to maintain good relationships with his family and friends and held a steady occupation. *Id.* Ultimately, the Board found that Appellant's level of functional impairment prior to June 14, 2012, was consistent with a 10-percent rating. (R. at 14). Appellant appealed that decision to this Court.

SUMMARY OF THE ARGUMENT

The Court should affirm the September 2, 2015, Board decision denying entitlement to an initial rating in excess of 10 percent for PTSD prior to June 14, 2012. The Board sufficiently set forth an adequate statement of reasons or

bases for its determinations in denying his claim. There is no clear error and the Board's findings are supported by the record.

ARGUMENT: THE BOARD'S FINDING THAT APPELLANT IS NOT ENTITLED TO AN INITIAL DISABILITY RATING HIGHER THAN 10 PERCENT FOR PTSD PRIOR TO JUNE 14, 2012, IS SUPPORTED BY AN ADEQUATE STATEMENT OF REASONS OR BASES AND IS NOT CLEARLY ERRONEOUS.

Disability ratings are determined by applying the criteria set forth in the VA Schedule of Rating Disabilities (Rating Schedule) and are intended to represent the average impairment of earning capacity resulting from disability. 38 U.S.C. § 1155; 38 C.F.R. § 4.1. Under the relevant diagnostic code (DC), a 10-percent rating is assigned for PTSD when the evidence shows:

Occupational and 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 controlled by continuous medication.

38 C.F.R. § 4.130, DC 9411.

A 30-percent rating is assigned for PTSD when the evidence shows:

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.

In general, the degree of impairment resulting from a disability is a factual determination and generally the Board's primary focus in such cases is upon the

current severity of the disability. *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994); *Solomon v. Brown*, 6 Vet.App. 396, 402 (1994). The Board's determination of whether a claimant is entitled to a higher disability rating is a factual finding that this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). In determining whether a finding of fact is clearly erroneous, this Court cannot "substitute its judgment for that of the [Board]." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). If there is a plausible basis in the record for the Board's factual determinations, this Court cannot overturn them. *Id.*

The Board's decision must be based on all the evidence of record, and the Board must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. "The statement must be 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). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. See *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *Gilbert*, 1 Vet.App. at 57.

Appellant identifies four distinct arguments in his brief; however, they are essentially the same argument just repackaged - that the Board erred by not

adequately addressing the lay statements from him and his wife, the March 2009 note from Ms. Dannon Tarpley, and the April 2009 VA treatment record. Appellant's Brief (A.B.) at 3-12. Essentially, Appellant merely disagrees with the Board's weighing of the evidence, but it is the Board's responsibility, and not Appellant's, to weigh the evidence. See *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of the evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). Contrary to Appellant's arguments, the Board adequately addressed the evidence of record, including the lay statements, the March 2009 note from Ms. Dannon Tarpley, and the April 2009 VA treatment record. Thus, Appellant's arguments are meritless.

With respect to the May 2008 lay statements provided by Appellant and his wife, he asserts that they support the next-higher, 30-percent rating, and that the Board omitted an adequate explanation for failing to give credit to these lay statements. (A.B. at 5-6).

Here, the Board directly addressed these statements in its September 2015 decision. (R. at 11-12, 14). The Board recognized that the lay statements of record endorsed symptoms of anxiety, nightmares, and irritability. (R. at 14). Contrary to Appellant's assertions, the Board specifically found that these statements from the Veteran and his wife were consistent with the criteria for a 10-percent rating prior to June 14, 2012. (R. at 14). The Board also correctly noted that Appellant was not competent to identify a specific level of disability of

this disorder, but he could report his symptoms. (R. at 14). The Board then noted that there was medical evidence of record directly addressing the diagnostic criteria and that these examination reports and clinical records were more probative than the Veteran's subjective complaints of greater symptomatology. (R. at 14).

Moreover, the September 2008 VA examiner addressed the same symptoms that Appellant and his wife endorsed. Specifically, the VA examiner considered Appellant's symptoms of nightmares, being easily startled and emotional, depressed, anti-social, and experiencing tingling in his stomach and chest. (R. at 431). In addressing the level and severity of Appellant's PTSD with his manifested symptoms, the VA examiner found that Appellant's PTSD symptoms had no negative impact on his ability to obtain and maintain physical or sedentary employment, and that it caused minimal interference with his social functioning. (R. at 434). Significantly, an April 2009 treatment provider further found that Appellant had "mild" PTSD after that provider noted that Appellant had mild anxiety and depression. (R. at 382).

The lay statements and the symptoms endorsed therein were fully addressed and acknowledged by the Board and the Board properly found that those statements along with the medical evidence indicated that Appellant's "overall symptomatology and level of impairment most nearly approximated those indicative of a 10[-]percent rating." See (R. at 14); A.B. at 5.

Next, Appellant asserts that the Board did not adequately address a March

2009 treatment note that indicated that he had moderate PTSD symptoms consistent with a 30-percent rating. (A.B. at 7-8). Here, the Board addressed the March 2009 note from Ms. Dannon Tarpley. (R. at 13). Specifically, in March 2009, Appellant's therapist opined that Appellant had moderate social and familial impairment as a result of his PTSD. (R. at 407). Despite Appellant's contentions, a finding of moderate social impairment is not sufficient to establish the next-higher rating. Pursuant to 38 C.F.R. § 4.126(b), when evaluating the level of disability from a mental disorder, the Board will consider, but shall not assign an evaluation based solely on, the extent of social impairment. 38 C.F.R. § 4.126(b) (2015). As such, Appellant's reliance on this finding alone to support a higher rating is misplaced.

Last, Appellant argues that the Board ignored the findings contained in an April 2009 VA treatment record. (A.B. at 7-8). Appellant asserts that this treatment record is consistent with a 30-percent rating because he endorsed past suicidal thoughts. (A.B. at 7). Appellant misreads the findings contained in this report in making his argument. During his April 2009 assessment, Appellant denied suicidal ideation, but reported thoughts of suicide in the previous 6 months after thinking about his financial problems. (R. at 374). Appellant directly linked his past thoughts of suicide to his financial problems and not his PTSD or its related symptoms. Moreover, at that time, Appellant did not have any issues with appearance, general behavior, perception, cognitive functioning, or thought pattern or content. (R. at 381). The April 2009 provider specifically found that

Appellant had “mild” PTSD. (R, at 382). Thus, not only were Appellant’s suicidal thoughts limited to his financial problems, but his PTSD was also found to be mild.

Significantly, the Board addressed this April 2009 treatment record in its decision, including Appellant’s reports of past suicidal thoughts. (R. at 13). In relying on the medical evidence, including this April 2009 treatment report, the Board quite plausibly found that that evidence did not reflect that Appellant had occupational and social impairment consistent with the next-higher rating. (R. at 13-14). Moreover, even Appellant acknowledges that his suicidal thoughts were transient during this time, which supports a 10-percent rating. (A.B. at 8).

In its decision, the Board noted that Appellant had anxiety, sleep disturbance, and irritability. (R. at 13). The Board also pointed out that Appellant was able to maintain good relationships with his family and friends, and that he held a steady occupation. (R. at 13). The evidence supports the Board’s conclusions. At his September 2008 VA examination, Appellant reported being married to his wife since 1973, occasionally arguing, never having a fight, and never going to bed angry. (R. at 428). At that time, he also reported working successfully in sales from 1970 to November 2006 when the job that he was working in was eliminated. (R. at 431). Appellant indicated that he was hired with another company in April 2008 and attributed his difficulty in getting a job to “age discrimination.” (R. at 431). Appellant reported a good energy level and enjoyed cooking, yard work, and playing chess. *Id.* Socially, he indicated that he

was close to his wife, three children, brother, and his sister-in-law. (R. at 433). He estimated having between 6 to 8 friends, and that he did not have any issues with authority figures. (R. at 433). Moreover, in April 2009, Appellant reported being semi-retired, collecting Social Security, and working full time. (R. at 374). The September 2008 examiner opined that Appellant's PTSD symptoms had no negative impact on his ability to obtain and maintain physical or sedentary employment, and that it caused minimal interference with his social functioning. (R. at 434). Similarly, the April 2009 provider found that Appellant's PTSD symptoms were "mild." (R. at 382).

Here, despite Appellant's assertions, the Board addressed the lay statements of record and the medical evidence, including the March 2009 note and the April 2009 treatment record, and plausibly found that it supported the current 10-percent rating. Moreover, Appellant has not shown how that evidence he relies on contradicted or otherwise undermined the Board's analysis of his overall occupational and social impairment. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding appellant bears burden of demonstrating error on appeal).

Ultimately, the Board plausibly determined that the preponderance of the evidence was against his claims. The Board's September 2015 decision included an adequate statement of reasons or basis for its findings and conclusions on all material issues of fact and law presented on the record. Because there is a plausible basis in the record for the Board's factual findings, the BVA's denial

was not “clearly erroneous.” *Gilbert*, 1 Vet. App. at 52; see generally *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001). Hence, the September 2, 2015, Board decision should be affirmed.

CONCLUSION

In light of the foregoing, Appellant’s arguments fail to demonstrate error, much less prejudicial error. Moreover, as it is axiomatic that issues or arguments not raised on appeal are abandoned, *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000), any and all issues that have not been addressed in Appellant’s brief have therefore been abandoned. The Secretary thus urges the Court to affirm the Board’s September 2, 2015, decision.

Respectfully submitted,

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