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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-2645

THOMAS R. BYRD, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KASOLD, *Judge*.

MEMORANDUM DECISION

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

KASOLD, *Judge*: Veteran Thomas R. Byrd appeals through counsel an April 27, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 70% for post-traumatic stress disorder (PTSD) and a total disability rating based on individual unemployability (TDIU). Mr. Byrd argues that the Board erred by (1) finding his disability picture did not more nearly approximate a 100% rating for PTSD and inadequately explaining its decision, (2) relying on an April 2009 medical report that was inadequate for rating purposes, (3) characterizing the period on appeal as starting on the date he filed for TDIU, and (4) providing inadequate reasons or bases in support of its decision to deny TDIU. The Secretary disputes these arguments. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, that part of the Board decision on appeal denying an increased rating for PTSD will be affirmed, and that part of the decision denying entitlement to TDIU will be set aside and the matter remanded for further adjudication.

PTSD

Mr. Byrd contends that the Board clearly erred in finding that his PTSD symptoms did not more nearly approximate a 100% disability rating because he has symptoms explicitly contemplated by such a rating and other symptoms that fall between the criteria for 70% and 100% rating. More

specifically, he contends that the Board erred by finding that (1) his homicidal and suicidal ideation did not constitute persistent danger of hurting himself or others – a symptom listed in the 100% rating criteria – given that he has had such ideation since 2008, (2) a January and April 2009 medical report did not show gross impairment of thought – a symptom listed in the 100% rating criteria – despite noting recurrent intrusive thoughts and aforementioned ideation, and (3) his symptoms that were in-between the levels contemplated by the 70% and 100% rating criteria were not attributable to the higher rating pursuant to the benefit of the doubt rule.

With regard to his first contention, Mr. Byrd fails to appreciate that, reading the Board decision as a whole, *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases "as a whole"), the Board found that the noted ideation did not constitute a persistent danger of hurting himself or others because he had not consistently exhibited the symptom and he denied specific means, plans, time frames, or intent to commit such an act. Based on the record of proceedings (ROP), the Board's finding is plausible and not clearly erroneous, *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

As to Mr. Byrd's second contention, the Board noted that the January 2009 medical report assigned a Global Assessment and Functioning (GAF) score that reflected *some* impairment in thought and the April 2009 report noted moderate impairment, and Mr. Byrd cites no evidence that his ideation or intrusive thoughts reflected gross impairment in thought process. Succinctly stated, based on the ROP, the Board's finding that the reports did not reflect gross impairment of thought is plausible and not clearly erroneous. *See id.*

As to his third contention, Mr. Byrd fails to appreciate the benefit of the doubt rule does not apply to each bit of evidence; rather it applies only to the compilation of positive and negative evidence on an issue. *See Gilbert*, 1 Vet.App. at 55 ("Moreover, [§ 5107(b)] does not apply to each and every issue; by its terms, it applies only to the merits of an issue material to the determination of the matter." (internal quotation marks omitted)); *id.* ("When all of the evidence is assembled, the Secretary, or his designee, is then responsible for determining whether the evidence supports the

claim or is in relative equipoise, with the veteran prevailing in either event, or whether a fair preponderance of the evidence is against the claim, in which case the claim is denied."); *see also Ortiz v. Principi*, 274 F.3d 1361, 1364-65 (Fed. Cir. 2001) ("The statutory benefit of the doubt rule thus would apply only when the factfinder determines that the positive and negative evidence relating to the veteran's claim are 'nearly equal,' thus rendering any decision on the merits 'too close to call.'").

Here, the Board found that Mr. Byrd's disability picture was more nearly approximated by the 70% rating criteria than the 100% rating criteria, and further found that the preponderance of the evidence weighed against a rating in excess of 70% such the benefit of the doubt rule was not for application. Based on the ROP, the Board's finding is plausible and not clearly erroneous, *see Gilbert, supra*, and Mr. Byrd fails to demonstrate that the Board erred by not applying the benefit of the doubt rule, *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Ortiz*, 274 F.3d at 1364 ("[T]he benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant").

Mr. Byrd also contends that the Board inadequately explained why his symptoms did not support a 100% disability rating. Based on the ROP, however, and reading the report as a whole, *see Janssen, supra*, the Board fairly summarized Mr. Byrd's symptomatology, including symptoms specifically noted in the 100% rating criteria, or not included in either the 70% or 100% rating criteria, and explained that his overall disability picture more nearly approximated the 70% rating because his symptoms – including, inter alia, sleep impairment, intrusive thoughts, depression, irritability – were moderate to severe, which was also reflected by his GAF scores of 39 and 53.¹ As noted above, the finding that Mr. Byrd's disability level was more nearly approximated by the 70% rating criteria is plausible and not clearly erroneous. Moreover, the Board's statement in support of that finding is understandable and facilitative of judicial review. *See Allday v. Brown*,

¹ The Board explained that "[a] GAF score of 31 to 40 indicates some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work) . . . [and a] GAF score of 51-60 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning, (e.g., few friends, conflicts with peers or coworkers)." Record at 9 (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46-47 (4th ed.))

7 Vet.App. 517, 527 (1995) (holding that the Board's 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").

Adequacy of Medical Report

Mr. Byrd contends that the Board clearly erred in relying on the April 2009 medical report because the examiner (1) provided a conclusory opinion without explanation, and (2) was not knowledgeable about Mr. Byrd's full medical history because the examiner did not state that he reviewed a January 2009 medical report. Contrary to Mr. Byrd's first contention, the April 2009 medical report does not reflect an unexplained conclusory opinion. The report reflects an opinion predicated on a review of the claims file and examination of Mr. Byrd. Read as a whole, *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (requiring medical reports be read as a whole), the examiner's opinion that Mr. Byrd was not unable to work was based on an examination of Mr. Byrd and consideration of Mr. Byrd's symptoms – including, inter alia, that Mr. Byrd had (1) psychiatric problems but was alert, (2) no memory problems, (3) no thought process or communication problems, and (4) stopped working a year prior to the examination because of shoulder difficulties. Succinctly stated, Mr. Byrd fails to demonstrate that the April 2009 medical opinion was unexplained.

With regard to Mr. Byrd's second assertion, the examiner specifically noted his review of the claims file, and there is no requirement that a medical examiner cite to each piece of evidence contained therein. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). Succinctly stated, Mr. Byrd fails to demonstrate that the examiner was not knowledgeable about the 2009 medical report, and Mr. Byrd otherwise fails to demonstrate that the Board clearly erred by assigning weight to the 2009 medical report. *See Hilkert, supra*; *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (explaining that Board's determination of adequacy of medical report is reviewed for clear error); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991) (holding a medical report is adequate when it is based upon the veteran's medical history and examinations and when it describes the disability in sufficient detail for the Board to rely on it).

Appeal Period

Mr. Byrd correctly notes that the Board erred by not adequately explaining why it viewed his appeal as involving the correct rating for PTSD and TDIU for the period one year prior to December 29, 2008, instead of one year prior to July 2008, the date of his initial claim for benefits for PTSD, for which there was associated evidence of unemployability. He reasons that this is prejudicial because it indicates that the Board failed to consider a June 2008 medical report regarding his PTSD and a September 2008 medical report addressing his diabetes. Assuming arguendo that the Board erred as to the period on appeal, Mr. Byrd fails to appreciate that the Board specifically noted possible entitlement to an effective date up to one year prior to December 2008 such that (1) the Board is presumed to have considered the record evidence within that time frame, and (2) the Board's error concerning the time frame would only be prejudicial error if the Board failed to address evidence that was potentially, materially favorable from within the period on appeal. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (noting that the appellant bears burden of demonstrating prejudice on appeal); *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (Board is presumed to have considered entire record); *Thompson v. Gober*, 14 Vet.App 187, 188 (2000) (per curiam order) (requiring the Board to provide reasons for the rejection of materially favorable evidence but not imposing such a requirement on all evidence).

With regard to PTSD, although the June 2008 medical report is relevant thereto, the Board discussed a January 2009 medical report that was prepared by the same examiner who prepared the June 2008 report, and the examiner stated in the later report that his findings were highly consistent with those in his June 2008 report. In this context, Mr. Byrd fails to demonstrate that the Board's reasons or bases did not adequately address the substantive content of the June 2008 report, and the weight it assigned to that content. *See Hilkert, supra*. As to the September 2008 medical report, it addresses Mr. Byrd's diabetes, and he fails to demonstrate it was potentially materially favorable to his PTSD rating. *Id.*

On the other hand, the September 2008 medical report is potentially materially favorable to TDIU entitlement regardless of whether the time period on appeal began the one year prior to December 29, 2008, or the one year prior to July 2008, and the Board's failure to address this record frustrates judicial review. *See Thompson and Allday, both supra*. Remand is warranted. *See Tucker*

v. West, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

TDIU

In light of the need to remand this matter as noted above, Mr. Byrd's other arguments pertaining to his request for TDIU are moot. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of claim under one theory moots the remaining theories advanced on appeal).

Remand and Conclusion

On remand, Mr. Byrd also may present any additional evidence and arguments in support of the remanded matter, and the Board must consider any evidence and argument so presented. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

Upon consideration of the foregoing, that portion of the April 27, 2015, Board decision on appeal denying an increased rating for PTSD is AFFIRMED, and that part of the decision denying entitlement to TDIU is SET ASIDE and the matter REMANDED for further adjudication.

DATED: November 30, 2016

Copies to:

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