Vet. App. No. 19-3124

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ALLEN J. COOPER
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board) March 13, 2019, decision that denied (1) a rating above 50% for dysthymia with associated depression symptoms and (2) a total disability rating based on individual unemployability (TDIU), when the Board did not clearly err in any of its factual findings and provided an adequate statement of reasons or bases.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review the final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On March 13, 2019, the Board issued a decision denying a rating above 50% for dysthymia and TDIU. (Record Before the Agency (R.) at 3 (3-22)).

Appellant, Allen J. Cooper, appealed to this Court in May 2019.

C. STATEMENT OF RELEVANT FACTS

In April 1999, a VA regional office (RO) granted Appellant service connection for dysthymia, assigning a non-compensable rating and an effective date in September 1998. (R. at 2560 (2558-63) (rating decision), 2550-52 (rating decision cover letter)). In that same decision, the RO granted service connection for limited motion of the right ankle and for a painful scar of the right ankle. (R. at 2560). In February 2005, the Social Security Administration (SSA) found that Appellant had become disabled in September 2002. (R. at 2366-67). The SSA determined that Appellant's psychological conditions caused his disability. (R. at 2367). Appellant filed a claim for an increased rating for his service-connected disabilities in October 2010. (R. at 2235-37). In January 2011, Appellant submitted a statement associated with a continuing disability review of his SSA benefits in which he alleged that his symptoms caused him to be fatigued. (R. at 2342 (2337-44)). Appellant described having panic attacks and anxiety all day. (*Id.*). He further stated that he had difficulty performing activities such as doing chores, driving or using public transportation, shopping, and completing tasks because of his mental health symptoms. (R. at 2343).

In March 2011, Appellant underwent an SSA examination, and the examiner diagnosed dysthymic disorder. (R. at 1830 (1828-31)). That same month, Appellant completed an SSA function report on which he stated that anxiety and panic attacks prevented him, "with very rare exception," from leaving the house.

(R. at 1815 (1815-22)). Appellant's wife also submitted a statement to the SSA in March 2011, alleging that Appellant's anxiety and panic attacks interfered with his functioning. (R. at 1403 (1403-10)). A year later, in March 2012, Appellant submitted a claim for TDIU. (R. at 2189-90). On his application, Appellant alleged that dysthymic disorder, depression, chronic fatigue syndrome, anxiety, and panic disorder caused him to be unable to engage in any substantially gainful occupation. (R. at 2189). Along with his application for TDIU, Appellant submitted a statement in which he alleged that his mental health conditions and fatigue caused him to stop working. (R. at 2206 (2205-10)). Appellant's wife also submitted a statement in which she alleged that Appellant was unable to attend events such as weddings and funerals because of his mental health conditions. (R. at 2202 (2201-03)).

Appellant underwent a VA psychological examination in January 2013. (R. at 1193-1202). Appellant reported to the examiner that he had been with his wife since 1994 and stated that, because of panic attacks, he rarely leaves the house. (R. at 1197). Appellant also reported that he had visited relatives at Christmas and that he sometimes goes to his children's sporting events. (R. at 1198). Concerning his work history, Appellant stated that he had last worked in 2000 but explained that he was not able to hold down a job because of his anxiety and depression. (*Id.*). The examining psychologist noted that Appellant had diagnoses of dysthymia and anxiety disorder and stated that it was indeed possible to differentiate which symptoms were attributable to which diagnosis. (R. at 1195-

96). Specifically, the examiner stated that Appellant's depressed mood, lack of energy, sleeping too much, low self-esteem, and feelings of hopelessness were attributable to his dysthymia. (R. at 1196). And Appellant's anxiety disorder caused him to have significant anxiety dealing with minimal stress. (*Id.*). The examiner opined that Appellant's mental diagnoses collectively caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. (*Id.*). The examiner also opined that Appellant's anxiety caused him the most difficulty in terms of his functional ability and stated that his anxiety did not appear to be related to his dysthymia or his military service. (R. at 1202). Finally, the examiner concluded that Appellant's mental conditions would not render him unable to secure work. (*Id.*). Appellant also underwent a VA physical examination in January 2013. (R. at 1166-93). The examiner opined that Appellant's ankle condition caused him to be unable to perform work requiring repeated climbing or prolonged walking or standing. (R. at 1193).

The following month, February 2013, the RO granted an increased rating for Appellant's dysthymia, from 0% to 30%, and assigned an effective date for the increase in October 2010. (R. at 2016 (2016-23)). Later that year, in May 2013, the RO, inter alia, denied TDIU. (R. at 1961 (1957-63)). That same month, Appellant filed a notice of disagreement (NOD) with the Board's denial of a higher rating for dysthymia, asserting that he should receive a 100% rating for that condition. (R. at 1942 (1942-43)). In that regard, Appellant stated that he had

daily panic attacks, disturbances of motivation and mood, and difficulty with work and social relationships. (R. at 1943). Appellant also stated that he had impaired judgment, abstract thinking, and memory. (*Id.*). The next month, June 2013, Appellant filed an NOD with the Board's decision that denied TDIU. (R. at 1932 (1932-33)). Appellant was hospitalized with suicidal ideation in July 2013. (R. at 1384-88, 1345-47, 1340-42). On discharge, a nursing note indicated that Appellant had no suicidal ideation and that he was not in acute or imminent risk. (R. at 1313 (1306-14)). The month after his hospitalization, in August 2013, a VA social worker noted that Appellant's mental status was within normal limits. (R. at 1165 (1162-66)).

In September 2013, the RO issued a decision granting an increased rating of 50% for Appellant's service-connected dysthymia, effective October 2010. (R. at 1914 (1911-16)). The RO styled the claim for which an increased rating was granted as "dysthymia with associated symptoms of depression, anxiety with panic attacks, and chronic fatigue syndrome." (*Id.*). VA treatment records from October 2013 indicate that Appellant was depressed and that he had excessive anxiety. (R. at 1136 (1136-37)). In May 2014, a VA psychologist reviewed Appellant's medical records and opined that his mental health conditions, to include dysthymia, do not make him unemployable. (R. at 1133 (1132-33)). In June 2016, the RO issued a statement of the case (SOC) that denied TDIU and continued the 50% evaluation for dysthymia with associated symptoms of depression, anxiety with panic attacks, and chronic fatigue syndrome. (R. at 949 (915-52)). Appellant

appealed to the Board the following month, arguing that he should receive a 70% rating for his mental conditions. (R. at 911 (911-12)). In August 2016, the RO determined that another VA medical opinion was required. (R. at 906-08 (examination request)). Specifically, the RO instructed the VA examiner to determine if Appellant had any diagnosis other than dysthymia and, if so, to determine if such a diagnosis was a progression of the service-connected dysthymia. (R. at 908).

Following the RO's examination request, Appellant underwent another VA psychological examination in September 2016. (R. at 879-85). The examiner diagnosed dysthymia, panic disorder, and generalized anxiety disorder, specifying that these two latter conditions were separate diagnoses from the dysthymia. (R. at 879). Appellant informed the examiner that "he gets more depressed in the winter months." (R. at 882). The 2016 examiner, like the 2013 examiner, concluded that it was possible to differentiate which symptoms were attributable to each diagnosis. (R. at 880). In that regard, the examiner stated that Appellant's mental diagnoses together caused occupational and social impairment with deficiencies in most areas but that panic disorder and generalized anxiety disorder were the primary causes of these limitations. (R. at 880). With regard to dysthymia, the examiner concluded that Appellant's reduced motivation and energy, along with his sleep impairment, caused a considerable degree of social and occupational impairment. (R. at 881). The examiner also opined that Appellant's anxiety and panic disorder were separate diagnoses from his service-

connected dysthymia and that anxiety was "much more prominent and disabling at this time relative to [the] depression symptoms." (R. at 885).

The RO issued a supplemental SOC (SSOC) in February 2017, denying TDIU and a rating above 50% for dysthymia with associated symptoms of depression, anxiety with panic attacks, and chronic fatigue syndrome. (R. at 776 (771-79)). A few days later, an RO decision review officer (DRO) proposed to sever service connection for anxiety with panic attacks and chronic fatigue syndrome because the grant of service connection for those conditions was the result of clear and unmistakable error (CUE). (R. at 766 (763-69)). In a May 2017 rating decision, the RO severed service connection for panic disorder and generalized anxiety disorder and chronic fatigue syndrome, with an effective date in August 2017.[1] (R. at 729 (729-35)). That same day, the RO issued another SSOC that again denied a rating above 50% for dysthymia and TDIU. (R. at 724 (718-28)).

The Board issued the decision on appeal on March 13, 2019. (R. at 3 (3-22)). Appellant appealed to this Court two months later.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's March 13, 2019, decision because Appellant has failed to demonstrate error in the Board's denial of a rating above

[1] In July 2017, Appellant filed an NOD with the Board's RO's decision severing service connection of service connection for chronic fatigue syndrome and panic disorder and anxiety disorder. (R. at 687-89). In October 2013, the RO issued an SOC finding that these severances were proper. (R. at 61 (25-69)). The record does not show that Appellant appealed to the Board.

50% for dysthymia or its denial of TDIU. The Board did not clearly err in any of its factual findings, to include its denial of an increased rating and TDIU and its implicit finding that the VA medical opinions of record were adequate, and it supported the decision with an adequate statement of reasons or bases.

ARGUMENT

The Board's Factual Findings Are Not Clearly Erroneous, and It Supported the Decision with an Adequate Statement of Reasons or Bases

Appellant has failed to identify clear error in the Board's denial of a 50% schedular rating for dysthymia and its denial of TDIU. (*See* Appellant's Brief). Likewise, he has failed to identify any inadequacy in its statement of reasons or bases. (*Id.*)

(a) The Board Did Not Err in Denying a Higher Rating for Dysthymia

VA assigns a disability rating for mental health conditions that most closely reflects the level of social and occupational impairment that a veteran experiences. *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002). In that regard, a 100% rating for dysthymia under 38 C.F.R. § 4.130, Diagnostic Code (DC) 9433, requires evidence of

> [t]otal 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.

A 70% rating for dysthymia requires evidence of

> [o]ccupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood , due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

And a 50% rating requires evidence of

> [o]ccupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

The Board's determination of the appropriate schedular rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). Under this standard, the Court cannot "substitute its judgment for that of the B[oard] on issues of material fact." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). If there is a plausible basis in the record for the Board's factual determinations, the Court cannot upset them. *See id.* Like all factual findings, the Board's findings about which level of disability to assign must be supported by 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). "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 th[e] Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Where a claimant has both service-connected and non-service-connected disabilities, the Board must attempt to distinguish the effects of each disability and, where such a distinction is not possible, attribute the effects to the service-connected disability. *See Mittleider v. West*, 11 Vet.App. 181, 182 (1998).

Here, the Board did not clearly err when it denied a higher rating for dysthymia, and it supported the denial with an adequate statement of reasons or bases. (R. at 8-15). Specifically, the Board relied on the VA medical opinions from January 2013 (R. at 1193-1202) and September 2016 (R. at 879-85) when it denied a higher rating for dysthymia. (R. at 13-15). Specifically, the Board relied on the examiners' conclusions that it was possible to differentiate the symptoms of the service-connected mental conditions from the non-service-connected conditions. (R. at 13 (citing *Mittleider*, 11 Vet.App. at 182)). In that regard, the January 2013 VA examiner concluded that Appellant's non-service-connected anxiety disorder caused most of his functional limitations, to include his difficulties holding a job. (R. at 1198, 1202). And the September 2016 VA examiner opined that Appellant's anxiety and panic attacks, which limit his ability to do things in the community and attend family events, were more limiting than the service-connected dysthymia. (R. at 883, 885). These examination reports provide a plausible basis for the Board's conclusion that Appellant's service-connected dysthymia caused only the occupational and social impairment with reduced reliability and productivity associated with a 50% rating. (R. at 12-15); *see Gilbert*,

1 Vet.App. at 53. Thus, the Board's finding that a rating above 50% for dysthymia is not warranted is not clearly erroneous. *See Gilbert*, 1 Vet.App. at 53. And, by considering the evidence of record and explaining the reasons for the decision, the Board provided an adequate statement of reasons or bases for the denial. *See Allday*, 7 Vet.App. at 527.

Appellant is entirely unpersuasive when he argues that the Board failed to provide an adequate statement of reasons or bases for its denial of a higher rating for dysthymia. (Appellant's Brief at 9-13). In that regard, Appellant provides a laundry list of evidence that he alleges the Board failed to consider. (*Id.*). In each case, the Board either specifically addressed this evidence or discounted its probative value. (R. at 8-15). Moreover, Appellant's arguments here amount to a suggestion that the Board must address every piece of evidence in the record. (*See* Appellant's Brief at 9-13). This is simply not something the Board is required to do. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). In considering the evidence Appellant cites, it is crucial to recall that there is no dispute about the fact that Appellant's mental disabilities impose limitations greater than those contemplated by the 50% rating for dysthymia. But Appellant may be granted a higher rating only for the symptoms of his dysthymia, because that is the only mental disorder for which he had been granted service connection. *See Mittleider*, 11 Vet.App. at 182.

Turning to Appellant's long list of evidence, he first alleges that the Board erred by not considering lay statements Appellant and his spouse submitted to the

SSA in 2011 or Appellant's reports to an SSA examiner. (Appellant's Brief at 9 (citing (R. at 1828-31 (March 2011 SSA examination report), 2337-44 (January 2011 SSA report), 1815-22 (March 2011 SSA statement, Appellant), 1403-10 (March 2011 SSA statement, wife)). Appellant also complains that the Board did not consider the statements in his 2013 NODs (R. at 1932-33, 1942-43) or his July 2016 appeal to the Board (R. at 911-12). (R. at 9, 11, 12). Contrary to Appellant's assertions here, the Board specifically addressed the lay statements of record and accepted them as probative of the evidence Appellant, his family members, and friends could observe. (R. at 15). But the Board also quite accurately found that this lay evidence was not competent to relate their observations to any specific diagnosis. (*Id.*). Thus, the assertion that the Board did not consider these lay statements is simply false. And, because the Board explained its reason for discounting the lay statements, it provided an adequate statement of reasons or bases. *See Allday*, 7 Vet.App. at 527.

Appellant next asserts that the Board erred by not addressing medical evidence from his July 2013 hospitalization. (Appellant's Brief at 10-11). In that regard, he cites July 2013 VA treatment records (R. at 1345-46, 1385-87) and complains that the Board did not enumerate each symptom noted therein. (Appellant's Brief at 10-11). But the Board specifically addressed the evidence from this hospitalization, noting that he had increased depression, anxiety, and suicidal ideation. (R. at 10 (referencing R. at 1385)). The Board also noted that, at the time of his discharge, Appellant had no suicidal thoughts and was found to

have few risk factors for suicide (R. at 1313) and that a mental status examination the month after his hospitalization revealed that he was normal (R. at 1165). (R. at 10). The Board concluded that the symptoms Appellant experienced during his hospitalization, to include suicidal ideation and difficulty adapting to stressful circumstances, resolved within a few days and so the severity, frequency, and duration of Appellant's symptoms did not warrant a higher rating. (R. at 13). Because the Board specifically addressed the effects of Appellant's symptoms, it provided an adequate statement of reasons or bases for its denial of a higher rating. *See Gilbert*, 1 Vet.App. at 53; *see also Mauerhan*, 16 Vet.App. at 440-41. In short, even though the Board did not separately list every symptom noted during the 2013 hospitalization, there can be no serious argument that it did not consider these symptoms or their effect on Appellant's social and occupational functioning. (*See* R. at 13).

Appellant next cites, for a second time, the 2011 records submitted to the SSA. (Appellant's Brief at 12 (citing R. at 1403, 1406, 1408, 1815-17, 1819-20, 2340, 2343)). Each record that Appellant cites here is a lay statement about the extent of Appellant's symptoms. As noted above, the Board addressed the lay statements of record but found that they were not competent evidence linking Appellant's symptoms to his single service-connected mental disability. (R. at 15). In support of his argument that the Board failed to address all the relevant evidence of record, Appellant twice cites an October 2013 VA treatment record, which notes that he was depressed and unmotivated. (R. at 1136; Appellant's Brief at 11, 12).

Appellant does not explain why it was an error for the Board not to have cited this record, and his assertion that the Board erred by not citing the record is puzzling, given that it shows only that Appellant had depression. (R. at 1136). This is a fact that VA has acknowledged since granting service connection for dysthymia in 1999. (*See* R. at 2550). Appellant's assertion that the Board erred by not considering the effects of chronic fatigue syndrome is meritless given that he is no longer in receipt of service connection for that condition (*see* R. at 729), a fact that Appellant himself acknowledges. (Appellant's Brief at 13). And finally, Appellant's assertion that no expert has distinguished the effects of the service-connected dysthymia from those of panic disorder and anxiety (Appellant's Brief at 13) is simply false, as both the January 2013 (R. at 1193-1202) and September 2016 (R. at 879-85) VA examiners did just that.

(b) The Board Did Not Err in Denying TDIU

Appellant is equally – if not more – unpersuasive in arguing that the Board erred in denying TDIU. In that regard, a total disability rating is warranted when, because of service-connected disabilities assessed in isolation, a veteran is unable to secure or follow a substantially gainful occupation. 38 C.F.R. § 4.16. If certain percentage ratings are met, the Board may assign TDIU in the first instance. *See* 38 C.F.R. § 4.16(a). Specifically, the Board may originally grant TDIU when a single disability is ratable at 60% or more or a combination of disabilities are ratable at 70% or more with at least one of them being rated at a minimum of 40%. *Id.* In cases where a claimant is unable to secure and follow a substantially gainful

occupation but the percentage standards from § 4.16(a) are not met, the Board must first remand for the RO to submit the claim to the Director, Compensation Service, for "extra-schedular" consideration. *See* 38 C.F.R. § 4.16(b). The Board's determinations about whether to grant TDIU or submit the claim for extra-schedular consideration are findings of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Gilbert*, 1 Vet.App. at 53. And the Board must support its findings, here, just as with all decisions, with an adequate statement of reasons or bases. *See Allday*, 7 Vet.App. at 527.

In addressing TDIU, the Board correctly noted that Appellant's combined disability rating for the appeal period was 60% – 50% for dysthymia, 20% for a right ankle disability and 10% for a right ankle scar – and thus that the percentage requirements from § 4.16(a) were not met. (R. at 17). But the Board considered whether an extra-schedular referral for TDIU was warranted. (*Id.*). In that regard, the Board considered Appellant's March 2012 application for TDIU on which he claimed that his mental health conditions prevented him from securing substantially gainful employment. (R. at 17). The Board also considered evidence that Appellant had not worked since the early 2000s and that he was in receipt of disability benefits from the SSA. (R. at 17-18). In finding that submission for extra-schedular consideration was not warranted, the Board considered the January 2013 VA examiner's conclusion that Appellant's mental disabilities would not prevent him from securing work. (R. at 19 (citing R. at 1202)). The Board also considered the May 2014 VA examiner's opinion that Appellant's mental health

issues did not render him unemployable. (R. at 19 (citing R. at 1133)). And the Board considered the September 2016 VA examiner's conclusions that Appellant had occupational and social impairment with deficiencies in most areas and that anxiety caused more of his symptoms than depression. (R. at 19 (citing R. at 880, 885)). This evidence provides a plausible basis for the Board's finding that submission for extra-schedular consideration was not warranted, so this finding is not clearly erroneous. *See Gilbert*, 1 Vet.App. at 53. And, by explaining the reasons for its findings, the Board provided an adequate statement of reasons or bases. *See Allday*, 7 Vet.App. at 527.

Appellant is again entirely unpersuasive when he argues that the Board provided an inadequate statement of reasons or bases. (Appellant's Brief at 14-19). First, Appellant's argument – that the Board erred in relying on the September 2016 VA examination report because the examiner did not state which symptoms were attributable to which disorder (Appellant's Brief at 14; R. at 880) – is thoroughly misplaced, because the examiner did just that. Moreover, even if the Board were to attribute all of Appellant's mental symptoms to his service-connected dysthymia, this would not help his argument that TDIU was warranted. Indeed, the 2016 VA examiner did not opine that Appellant was unemployable; rather, she concluded that his symptoms were consistent with the criteria for a 70% rating. (*See* R. at 880). Next, Appellant again asserts that the Board failed to consider certain evidence. (Appellant's Brief at 15). His argument here is nothing

more than a retread of his unpersuasive argument about the Board's statement of reasons or bases. (*Id.*).

Appellant next argues that the Board erred in finding that he did not have a single disability rated at 60% because his dysthymia was granted as secondary to his service-connected ankle disorder. (Appellant's Brief at 16 (citing R. at 2561)). There is simply no basis for Appellant's argument that a mental health condition granted as secondary to a physical condition results from a common etiology with the physical condition under the meaning of § 4.16(a)(2). (Appellant's Brief at 16). And the Board did not clearly err in finding that Appellant has three separate conditions, none of which is rated at 60% or higher. (*See* R. at 17). Appellant fails to identify any error in the Board's decision when he states that "the Board still had a duty to consider whether to refer the case to the Compensation Director for extra-schedular TDIU consideration." (Appellant's Brief at 16). The Board specifically considered whether a submission to the Director of Compensation Service was warranted. (R. at 17-19). This is plain on the face of the decision. (R. at 17-19). Appellant's inability to locate the Board's discussion of extra-schedular referral within the body of the decision does not render the Board's statemen of reasons or bases inadequate.

Appellant's argument that the Board erred in its consideration of the effects of his service-connected ankle and scar conditions is likewise unavailing. (Appellant's Brief at 17-19). In that regard, the Board discussed these other service-connected disabilities and noted both that Appellant did not allege that they

affected his employability, and the record did not suggest that they affected his employment. (R. at 16). In that regard, the Board noted that Appellant specified on his March 2012 application for TDIU that his mental disabilities caused him to be unable to work. (R. at 17 (citing R. at 2189)). Given Appellant's allegation that his mental disabilities, but no other condition, affected his ability to work, the Board was justified in considering only those disabilities. *See Robinson v. Peake,* 21 Vet.App. 545, 553 (2008) (recognizing that the Board is not required "to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision"). Moreover, Appellant's has pointed to no evidence that his ankle and scar disabilities have caused him to be unable to work. His argument that the January 2013 VA examination report (R. at 1166-93) somehow demonstrates that the ankle disability causes him to be unable to work is entirely fruitless. (Appellant's Brief at 17-18). Indeed, all Appellant has shown is that his ankle disability affects his earning capacity, a fact that is true of every compensable condition in the ratings schedule. *See* 38 U.S.C. § 1155; 38 C.F.R. §§ 4.1, 4.2, 4.10.

(c) The Board Did Not Err in Relying on the VA Examination Reports of Record

Pursuant to its duty to assist, VA must sometimes provide a medical examination or obtain a medical opinion when such examination is necessary to decide a claim. 38 U.S.C. § 5103A(d)(1). Such a medical examination or opinion must be adequate for adjudication purposes. 38 C.F.R. § 4.2. To that end, a medical examination report or opinion is adequate when the examiner's opinion is

based upon consideration of the veteran's prior medical history and describes the disability in sufficient detail so that the Board's "'evaluation of the claimed disability will be a fully informed one.'" *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991)). The adequacy of a medical examination report is a question of fact that – again, just as all other findings of fact in a direct appeal – is subject to the "clearly erroneous" standard of review. *See Nolen v. Gober,* 14 Vet.App. 183, 184 (2000).

Here, the Board did not clearly err in its implicit finding that the January 2013 (R. at 1193-1202), May 2014 (R. at 1132-33), and September 2016 (R. at 879-85) VA medical opinions are adequate for adjudication purposes. In that regard, the examiners considered the evidence of record and provided a reasoned analysis in support of their conclusions. (R. at 1202, 1133, 884-85). Therefore, they provided a plausible basis for the Board's implicit finding that the duty to assist was satisfied. *See Gilbert*, 1 Vet.App. at 53.

Appellant's assertion that the Board was required to schedule a VA psychological examination during the winter months is utterly baseless. (*See* Appellant's Brief at 19-21). As an initial matter, this Court has acknowledged that practical considerations may govern VA's ability to schedule an examination during a flare-up. *See Sharp v. Shulkin*, 29 Vet.App. 26, 33-34 (2017) ("Where a condition's flares are irregular, unpredictable, infrequent, or brief, it is unclear how VA would schedule a flare-coincident examination as a practical matter, given its resources and duty to provide timely examinations as part of innumerable

claims."). Here, no factor militates in favor of a requirement that VA conduct an examination during the winter months. First, the only evidence Appellant cites is a single, vague notation in the September 2016 VA examination report that Appellant "stated he gets more depressed in the winter months." (R. at 882). Appellant did not provide any further detail to the examiner, nor did he allege that his social or occupational functioning worsened during this time. (*See id.*). On appeal, Appellant has pointed to no evidence that his level of social or occupational functioning worsens during the winter months. Second, all VA examiners must consider a claimant's medical history. *See Ardison*, 6 Vet.App. at 407. Regarding mental disabilities, the examiner must assess Appellant's level of social and occupational functioning. And any variation in a claimant's symptoms can just as easily be accounted for through an in-person interview, regardless of whether the interview takes place during a flare-up. In short, Appellant merely asserts, without reference to any evidence, that a psychological examination during the winter would show different results from the examinations conducted in the spring and fall. (Appellant's Brief at 21-22). Finally, Appellant ignores the fact that the first VA psychological examination report in the record was conducted in January 2013. (R. at 1193-1202). January falls between the winter solstice in December and the vernal equinox in March and so is a winter month.

Appellant bears the burden of demonstrating prejudicial error on appeal, but, in this case, he has not established that the Board committed any error, much less one warranting remand. *See* 38 U.S.C. § 7261(b)(2) (directing that the Court is

required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant bears burden of demonstrating error on appeal), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (holding that the appellant bears the burden of demonstrating prejudice on appeal and that remand is unnecessary "[i]n the absence of demonstrated prejudice"). Because Appellant has not established Board error, the Court should affirm the Board's decision.

CONCLUSION

In light of the foregoing, the Court should affirm the Board's March 13, 2019, decision.

Respectfully submitted,

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