Vet. App. No. 17-2310

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

MARIO I. HERNANDEZ,
Appellant,

v.

PETER O'ROURKE,
Acting 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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Appellant,	)	
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Acting Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the Court should affirm the June 22, 2017, decision of the Board of Veterans' Appeals (Board), which provided an adequate statement of reasons or bases for denying entitlement to: (1) a rating in excess of 50% for post-traumatic stress disorder (PTSD) prior to July 25, 2011, and since February 19, 2015; (2) a rating in excess of 70% for PTSD from July 25, 2011, to February 19, 2015, and (3) a total disability rating based on individual unemployability (TDIU).

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

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

B. NATURE OF THE CASE

On June 22, 2017, the Board issued the decision on appeal, which granted Mr. Mario I. Hernandez (Appellant) a 70% rating, but no higher, for PTSD from July 25, 2011, to February 19, 2015, denied a rating in excess of 50% for PTSD prior to July 25, 2011, and since February 19, 2015, and denied entitlement to TDIU. Appellant filed a timely appeal of the Board's decision on July 25, 2017.

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty in the U.S. Army from November 1967 to November 1969. [Record Before the Agency (R.) at 71]. In October 2001, he filed a claim for service connection for PTSD, hearing loss, and tinnitus. [R. at 577-91]. In an April 2002 rating decision, a Department of Veterans Affairs (VA) regional office (RO) granted service connection for PTSD and assigned a 30% rating. [R. at 505-08]. The RO also granted service connection for bilateral hearing loss with a noncompensable evaluation, and tinnitus with a 10% evaluation. *Id.*

In March 2008, Appellant filed an increased rating claim for PTSD, [R. at 493], and in April 2008, he was afforded a VA PTSD examination, [R. at 475-80]. At the examination, Appellant reported symptoms of irritability, anger, emotional distancing, hypervigilance, inability to "sit still," nightmares, agitation, trust issues, and isolation. [R. at 475]. The examiner noted that Appellant is "overly 'security conscious,'" has moderate memory impairment, and passive thoughts of death without a plan or intent. [R. at 478]. Appellant reported that it is difficult to maintain stable work, but that he has been working as a truck driver with the same company

for the last five years and has not lost any time from work. [R. at 477]. The examiner opined that Appellant "has difficulty establishing and maintaining effective work/school and social relationships because he tends to isolate from others." [R. at 479].

In July 2008, the RO granted Appellant an increased rating of 50% for PTSD, effective March 5, 2008. [R. at 391-96]. Appellant filed a timely notice of disagreement (NOD) in May 2009, asserting that he stopped working as a result of his PTSD. [R. at 382]. In July 2009, he filed an application for TDIU as a result of his service-connected disabilities, stating that he worked 40 hours per week as a truck driver with the same employer from 1998 to April 2008. [R. at 354-55]. The RO denied TDIU in an April 2010 rating decision. [R. at 283-85].

Meanwhile, Appellant received additional VA PTSD examinations in January 2010, [R. at 287-94], and July 2011, [R. at 209-20]. Appellant also underwent a VA hearing loss examination in February 2010. [R. at 935-36]. The examiner opined that with appropriate accommodations, such as hearing aids, Appellant's tinnitus and hearing loss should not preclude physical or sedentary employment. [R. at 936].

The January 2010 VA PTSD examiner noted that Appellant's "grooming is a little messy" and his shirt was soiled, but that he was able to maintain minimum personal hygiene. [R. at 289-90]. The examiner also noted that Appellant is anxious, sleeps five to six hours a night with nightmares twice a month, is irritable and experiences impaired impulse control, and has difficulty concentrating. [R. at

289-91]. Appellant reported that he retired in April 2008 because of age and because "he was not getting the loads he should," which he believed was the result of a dispatcher telling others that he was a "trouble maker." [R. at 292]. The examiner opined that Appellant's PTSD results in reduced reliability and productivity. [R. at 293].

At the July 2011 VA examination, the examiner noted increased PTSD symptomatology, including limited social relationships, chronic thoughts of suicide, a tendency towards violence and fighting, and excessive alcohol use to reduce his symptoms. [R. at 211, 218]. Appellant reported that he works twice a week, but otherwise stays to himself. [R. at 211]. The examiner opined that Appellant's suicidal thoughts, "chronic vague paranoia," loss of work due to anger and violence, poor hygiene, social isolation, and alcohol use resulted in total occupational and social impairment. [R. at 220].

In March 2012, the RO continued the 50% PTSD rating in a statement of the case, [R. at 86-106], and a decision review officer decision, [R. at 76-82]. Appellant filed his substantive appeal to the Board in May 2012. [R. at 73-74]. In February 2015, he underwent another VA PTSD and hearing examination. [R. at 48-54 (PTSD)]; [R. at 64-67 (hearing loss and tinnitus)]. The PTSD examiner noted that Appellant's mental disorders result in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care, and conversation. [R. at 49]. The examiner

noted that Appellant's depression decreased over the past year, but that he still experienced depressed mood along with symptoms of anxiety, suspiciousness, disturbances of motivation and mood, difficulty establishing and maintaining effective work and social relationships, difficulty adapting to stressful circumstances, and suicidal ideation. [R. at 50, 53]. Appellant reported that after working as a truck driver in a test fleet from 2011 to 2013, he was laid off after the company lost a contract. [R. at 50]. He was able to find full-time employment with another company, but had been recently suspended from work for spraying diesel fuel on a coworker. *Id.* However, aside from that incident, Appellant had no physical altercations or disciplinary problems and hoped to return to work within a few days. *Id.* The examiner opined that Appellant is capable of maintaining employment as a truck driver and that his "PTSD negatively impacts his functioning to a mild-moderate degree in his present job." [R. at 54].

At his VA hearing examination the same day, Appellant reported the functional impact of his hearing loss and tinnitus as a "difficulty hearing others when they speak." [R. at 66]. The VA audiologist also noted that Appellant is currently employed as a truck driver. [R. at 67]. She opined that if Appellant chose to change career fields, he might be excluded from jobs "that require normal hearing as a condition of employment." *Id.* In April 2015, the RO issued a supplemental statement of the case, continuing the 50% PTSD rating and the denial of TDIU. [R. at 40-47].

On June 22, 2017, the Board issued the decision on appeal, determining that staged ratings were required for Appellant's PTSD. [R. at 15 (1-24)]. The Board granted a 70% rating, but no higher, for PTSD between July 25, 2011, and February 19, 2015, but continued the 50% rating for the periods prior to July 25, 2011, and from February 19, 2015, because the medical and lay evidence showed that Appellant's symptomatology reflected occupational and social impairment with reduced reliability and productivity. *Id*. The Board denied entitlement to TDIU because it found that Appellant's service-connected disabilities do not prevent him from securing or following substantially gainful employment. [R. at 23]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's June 22, 2017, decision because Appellant has failed to demonstrate prejudicial error in the Board's denial of entitlement to a rating in excess of 50% prior to July 25, 2011, and after February 19, 2015, and in excess of 70% between July 25, 2011, and February 19, 2015. The Board provided an adequate statement of reasons or bases for denying higher ratings for all three staged rating periods. Additionally, the Board did not err when it denied entitlement to TDIU.

IV. ARGUMENT

The Board's determination of the appropriate degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Prokarym v. McDonald*, 27 Vet.App. 307, 312 (2015);

Johnston v. Brown, 10 Vet.App. 80, 84 (1997). Under this standard, if there is a plausible basis in the record for the Board's factual determinations, the Court cannot reverse them. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

In addition, the Board's decision must be based on all 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). "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).

When evaluating mental disorders, the Board must consider all evidence of record that bears on occupational and social impairment to determine the nature of Appellant's disability picture and to "assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering." *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see* 38 C.F.R. § 4.126(a). Symptomatology is the primary focus, but the symptoms enumerated in 38 C.F.R. § 4.130, Diagnostic Code 9411, do not constitute an exhaustive list. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013); *Mauerhan*, 16 Vet.App at 442. Consideration of the frequency, severity, and duration of a veteran's symptoms plays an important role in determining disability level. *Id.*; *see* 38 C.F.R. § 4.126(a). Thus, a veteran may qualify for a given disability rating by exhibiting the symptoms associated with that percentage, or other symptoms of similar

severity, frequency, and duration, that cause the level of occupational and social impairment specified in the rating criteria. *Vazquez-Claudio*, 713 F.3d at 117-18. Importantly, the mere presence of symptoms is not sufficient because such symptoms must actually cause occupational and social impairment to warrant the disability rating in question. *Id*.

A. The Board provided an adequate statement of reasons or bases for denying a rating in excess of 50% for PTSD prior to July 25, 2011.

Appellant lists a variety of examples of symptomatology he asserts are reflective of a rating in excess of 50% for PTSD that the Board did not consider. However, aside from a few exceptions, which the Secretary addresses below, Appellant's argument in support of an increased rating for the period prior to July 25, 2011, amounts to a disagreement with the Board's determination of the effective date for the increased 70% rating for PTSD. For example, Appellant argues that the Board should have considered evidence from the July 2011 VA examination that Appellant was neglecting his appearance and personal hygiene prior to July 25, 2011. Appellant's Brief (App. Br.) at 15-16. However, as Appellant acknowledges, the Board considered and relied on this very evidence when determining that he was entitled to an increased rating of 70% for PTSD from July 25, 2011, to February 19, 2015. [R. at 18]; *see* App. Br. at 15.

Although Appellant cites to the July 2011 VA examination report as evidence that he exhibited poor hygiene prior to the date of the examination, the examination report does not specify an earlier date when this symptom began. *See* App. Br. at

15; [R. at 209-20]. The effective date of an award "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). The Court has held that the date entitlement arose is not the date that the RO receives evidence, or necessarily the date of that evidence; rather, it is the date that the evidence establishes entitlement began, subject to the limitation of 38 U.S.C. § 5110(a). *See Tatum v. Shinseki*, 24 Vet.App. 139, 145 (2010) ("it is the information in a medical opinion, and not the date the medical opinion was provided that is relevant when assigning an effective date"); *see also DeLisio v. Shinseki,* 25 Vet.App. 45, 58–59 (2011) (holding that "an effective date should not be assigned mechanically based on the date of a diagnosis," rather the Board must examine "all of the facts"). The Board's determination of the proper effective date is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See Acosta v. Principi*, 18 Vet.App. 53, 57 (2004).

Here, there is a lack of evidence to establish that it was factually ascertainable that the increase in Appellant's symptomatology occurred prior to the date of the July 2011 VA examination. Appellant's sole support for his argument that the Board should have considered the evidence for the period prior to July 2011—and thus that an earlier effective date is warranted—is the July 2011 examiner's statement that Appellant "showers 1-2x/week." [R. at 220]; App. Br. at 15. From this statement, Appellant extrapolates that he did not shower on the three days preceding the date of the examination. App. Br. at 15. However, the

notation about the frequency of Appellant's bathing does not amount to a date of onset of Appellant's poor hygiene or any other PTSD symptomatology described in the examination report.

Contrary to Appellant's assertion, the Court's decision in *McGrath v. Gober,* 14 Vet.App. 28 (2000), does not support his argument that the Board should have considered the July 2011 examination as evidence that Appellant was entitled to a higher rating prior to July 25, 2011. In *McGrath*, the Board found that the appellant had filed a claim for a nervous condition in 1972 and that the claim had remained pending and unadjudicated until 1992, when the appellant was diagnosed with PTSD. 14 Vet.App. at 35. The Board awarded service connection and assigned an effective date of June 11, 1992, the date of the examination during which PTSD was diagnosed. *Id.* The Court found that the Board erred in failing to consider a 1994 medical opinion that "the appellant had been suffering demonstrable and overt symptoms of PTSD since May 1975 when he began treating the appellant." *Id*. at 32. Unlike the medical opinion in *McGrath*, the July 2011 VA examination does not state with specificity when Appellant's symptomatology began to worsen. Thus, the examination does not contain sufficient information that would allow the Board to determine when Appellant's symptomatology increased preceding the date of the examination such that the Board should have considered the evidence as relevant to the period prior to July 25, 2011. *See* 38 U.S.C. § 5110(b)(3); 38 C.F.R. § 3.400(o)(2).

To the extent the Board provided an inadequate statement of reasons or bases as to the effective date of Appellant's increased rating for the period from July 25, 2011, to February 19, 2015, such error is harmless. Remand to rectify harmless error serves no useful purpose. *See Shinseki v. Sanders*, 556 U.S. 396, 408-09 (2009); *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) ("Where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development that could not possibly change the outcome of the decision."); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (declining to remand where remand "would result in this Court's unnecessarily imposing additional burdens on the [Board and VA] with no benefit flowing to the veteran"). As discussed above, the July 2011 VA examiner does not attempt to date the onset of worsening of Appellant's symptomatology. Nor does Appellant otherwise cite to any evidence in his brief to establish a date of onset of worsening that would suggest that an earlier effective date is warranted. App. Br. at 15-16. In the absence of any evidence to establish when it was factually ascertainable that Appellant's symptomatology began to worsen prior to the date of the July 2011 VA examination, Appellant has failed to establish both that the Board erred in not considering this evidence for the period prior to July 25, 2011, and that he meets the criteria for an increased rating prior to this date. *See* 38 U.S.C. § 5110(b)(3); 38 C.F.R. § 3.400(o)(2); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc)

(holding that Appellant bears the burden of demonstrating error on appeal), *aff'd* 232 F.3d 908 (Fed. Cir. 2000).

Appellant also argues that the Board failed to analyze evidence that he engaged in obsessional rituals prior to July 2011. App. Br. at 10. He points to the April 2008 VA examiner's note that Appellant was "overly security conscious" and paranoid, which interfered with his routine activities. *See* [R. at 478]; App. Br. at 10. However, the Board acknowledged the evidence of obsessive rituals in the April 2008 VA examination, noted that Appellant exhibited hypervigilance, and explained that after considering the medical and lay evidence of record and Appellant's symptoms during the relevant rating period, his occupational and social impairment is best represented by a 50% rating. [R. at 10, 15-17]. Thus, reading the decision as a whole, it is clear that the Board considered this symptomatology, but determined that a higher rating was not warranted because it did not result in occupational and social impairment indicative of a higher rating. *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"). Additionally, Appellant fails to demonstrate how the symptomatology to which he cites results in occupational and social impairment with deficiencies in most areas. *See Mauerhan*, 16 Vet.App. at 440-41 (holding that VA must consider "all the evidence of record that bears on occupational and social impairment" and then "assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering").

To the extent Appellant argues that the Board erred in failing to consider evidence of paranoia as a symptom warranting a rating in excess of 50%, his argument is best characterized as a disagreement with the Board's assignment of the effective date for the 70% PTSD rating. *See* App. Br. at 10. The Board considered the evidence of paranoia and other symptomatology noted in the July 2011 VA examination and determined that his symptoms approximated those described by a 70% rating. [R. at 13, 18]; *see* [R. at 219-20]. Despite Appellant's assertion that he engaged in obsessional rituals and experienced paranoia prior to the date of the July 2011 VA examination, he fails to point to any evidence to establish that it was factually ascertainable that a worsening of Appellant's PTSD occurred prior to the date of the July 2011 VA examination. App. Br. at 10; *see* 38 U.S.C. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2); *see Hilkert*, 12 Vet.App. at 151. The July 2011 VA examination report does not specify an earlier date when these symptoms began, [R. at 209-20]; nor does the remainder of the record outlined by the Board, [R. at 9-15].

Similarly, Appellant argues that the Board failed to address evidence of suicidal ideation prior to July 25, 2011. App. Br. at 11-12. He cites to two examples, one of them being the July 2011 VA examination, which the Board considered when assigning a 70% evaluation. *See* App. Br. at 11; [R. at 12, 18]. Again, Appellant argues that evidence from this examination was relevant to the period prior to July 25, 2011, without pointing to any evidence as to when this symptomatology worsened before July 2011, and thus fails to demonstrate that he

meets the criteria for an increased rating before July 25, 2011. *See Hilkert*, 12 Vet.App. at 141. Although it may be true that Appellant's PTSD symptomatology did not suddenly increase on a single day, there is nothing in the examination report itself or elsewhere in the record that identifies an earlier date of onset of increased symptomatology or suggests one more appropriate than that which the Board assigned. *See Young v. McDonald*, 766 F.3d 1348, 1354 n.3 (Fed. Cir. 2014) (distinguishing *McGrath* because "there was a retrospective diagnosis" identifying a specific onset date). The July 2011 VA examiner's mere statement that Appellant had experienced suicidal thoughts in the "past year," whether chronic or not, does not specify a date when Appellant's symptoms began to worsen. [R. at 210, 211, 220]. Thus, the July 2011 VA examination does not contain sufficient information that would allow the Board to determine when Appellant's symptomatology increased preceding the date of the examination and Appellant fails to demonstrate Board error. *See Hilkert*, 12 Vet.App. at 151.

The only other evidence of suicidal ideation to which Appellant cites during the period prior to July 2011 is an April 2011 VA treatment record, from which he selectively quotes. *See* App. Br. at 11. However, after reading that entire medical record, it is clear that Appellant's symptomatology is not as severe as portrayed by his selective quote. The psychiatrist noted:

> He denied suicidal ideation, intent and plan. He did endorse having an occasional passive death wish or thoughts that if he were not alive he would not have to deal with any problems.

[R. at 235 (235-38) (emphasis added)]. Moreover, the Board noted Appellant's report of "occasional passive thoughts of death," [R. at 12], yet found that "[a]lthough the Veteran does have deficiencies in some areas, to the extent that his symptoms meet any of the criteria for a 70 percent rating or higher, the Board concludes that his overall level of disability does not exceed the criteria for a 50 percent rating," [R. at 17]. As the Court recognized in *Bankhead v. Shulkin*, the mere presence of a specific sign or symptom is not necessarily dispositive of a particular rating. 29 Vet.App. 10, 22 (2017); *see Vazquez-Claudio*, 713 F.3d at 117 (holding that the relevant inquiry is not only the presence of certain symptoms, but whether those symptoms caused occupational and social impairment in most areas). Not only has Appellant failed to demonstrate that the Board failed to consider evidence relevant to this rating period, but he fails to demonstrate that he has suicidal ideation productive of occupational and social impairment in most areas. *See Gilbert*, 1 Vet.App. 49 at 53.

Appellant also argues that the Board did not adequately consider evidence of impaired impulse control when assigning a 50% rating for the period prior to July 25, 2011. App. Br. at 13-14. As an initial matter, to the extent Appellant argues that the July 2011 VA examination report contains evidence of a "history" of anger and violence that the Board should have considered for the period prior to July 25, 2011, his argument is not persuasive. *See* App. Br. at 13. Appellant again fails to demonstrate that the record contains an earlier date on which this symptomatology occurred. The examiner's reference to a "history" is too vague a notation upon

which the Board could determine when Appellant's symptomatology began to increase. Thus, Appellant has not demonstrated that the Board erred in not considering this evidence when determining the appropriate rating for this period. *See Hilkert*, 12 Vet.App. at 151.

Appellant's remaining argument that the Board erred in granting a rating in excess of 50% because of the January 2010 VA examiner's note that Appellant demonstrated poor impulse control amounts to a disagreement with how the Board weighed the evidence. *See* App. Br. at 13-14. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (holding that it is the responsibility of the Board to assess the probative weight of the evidence); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to the evidence). The Board addressed the January 2010 VA examination in great detail, [R. at 12-13], but noted that despite the VA examiner's characterization of Appellant's impulse control as poor, his difficulties in the workplace ultimately only resulted in reduced reliability and productivity, which is consistent with a 50% rating, [R. at 16-17]. Significantly, Appellant fails to show that these incidents were productive of occupational and social impairment with deficiencies in most areas. *See Vazquez-Claudio*, 713 F.3d at 117.

Appellant's 50% rating for the period prior to July 25, 2011, contemplates occupational and social impairment with reduced reliability and productivity due to symptoms such as impairment of short- and long-term memory. 38 C.F.R. § 4.130.

The next higher rating requires that Appellant demonstrate occupational and social impairment with deficiencies in most areas and lists examples of symptoms reflective of a 70% rating, of which memory impairment is not included. *Id.* In order to qualify for a 100% rating, Appellant must demonstrate total occupational and social impairment due to symptoms such as memory loss for names of close relatives, own occupation, or own name. *Id.* Although Appellant cites to his report of memory problems at the April 2008 VA examination as evidence of memory loss for names of close relatives, his own occupation, or his own name, ultimately he merely disagrees with how the Board weighed the evidence, which cannot form the basis for error. *See Washington*, 19 Vet.App. at 368; *Owens*, 7 Vet.App. at 433.

As the Board noted, the April 2008 VA examiner documented that Appellant experienced moderate memory impairment, including problems with retention of highly learned material and forgetting to complete tasks. [R. at 10]; [R. at 478]. Appellant points to the April 2008 VA examiner's note that Appellant frequently gets lost and forgets street names and suggests that the Board should have considered this "akin to memory loss" as enumerated in the 100% rating criteria. App. Br. at 14; *see* [R. at 478]. However, the criteria for a 100% rating clearly specifies "memory loss for names of close relatives, own occupation, or own name." 38 C.F.R. § 4.130. Appellant fails to cite to any evidence suggesting that he does not remember the names of his close relatives, his occupation as a truck driver, or his own name. Moreover, at the January 2010 VA examination, Appellant

did not exhibit any memory loss or impairment. [R. at 290]. Because the Board considered evidence of impaired memory and Appellant's 50% rating contemplates impaired short- and long-term memory, he fails to demonstrate that the Board clearly erred in finding that his symptomatology for the period prior to July 25, 2011, more closely approximates a 50% rating. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (holding that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

B. The Board provided an adequate statement of reasons or bases for granting a 70% rating, but no higher, for Appellant's PTSD between July 25, 2011, and February 19, 2015.

Appellant argues that the Board erred in denying a rating in excess of 70% for PTSD for the period between July 25, 2011, and February 19, 2015, because it did not accept the July 2011 VA examiner's ultimate opinion that Appellant experiences total occupational and social impairment as a result of his PTSD. App. Br. at 16. However, Appellant's argument is unpersuasive and amounts to mere disagreement with how the Board weighed and evaluated the evidence. The Board considered the relevant evidence, applied the relevant law, and provided an explanation for his 70% rating that Appellant can understand and facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527*; Gilbert*, 1 Vet.App. at 57.

In determining that Appellant is entitled to an increased rating of 70% for this period, the Board reviewed in detail the symptoms Appellant demonstrated at the

July 2011 VA examination. [R. at 12-13]. Specifically, the Board discussed Appellant's disorientation to time, memory difficulties, suicidal thoughts, personal appearance and neglect of personal hygiene, and social isolation. [R. at 18]. The Board explained that despite these symptoms and the July 2011 VA examiner's opinion that Appellant's PTSD resulted in total occupational and social impairment, Appellant had been working during this period and was not totally disabled. [R. at 18]; *see* [R. at 220]. Thus, the Board's conclusion that Appellant was not entitled to a 100% rating for this period is supported by an adequate statement of reasons or bases.

In arguing that the Board erred in relying on the fact that Appellant was employed during this time period, Appellant conflates the standard for total schedular disability with that for TDIU. *See* App. Br. at 17-18. A 100% disability rating for PTSD is warranted for:

> Total 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.

38 C.F.R. § 4.130 (emphasis added). Appellant does not dispute that he was employed during this time period; rather, he mistakenly relies on VA's regulation pertaining to TDIU and its policy guidance for adjudicating TDIU claims in support of his proposition that the Board erred in its analysis of the schedular rating for PTSD. App. Br. at 17-18. The Board's conclusion that Appellant's symptoms did

not cause total occupational and social impairment during this period is plausibly supported by the record as Appellant had been working as a truck driver. *See* [R. at 50 (describing Appellant's employment history)]; [R. at 218 (same)]. Appellant's attempt to characterize his suicidal ideation and neglect of personal hygiene and appearance—symptoms the Board considered—as symptoms specified in the 100% rating criteria does not make the Board's interpretation of the facts any less plausible. Appellant merely disagrees with the Board's weighing of the evidence and its ultimate determination that Appellant did not demonstrate total occupational and social impairment. *See Cline v. Shinseki*, 26 Vet.App. 18, 28 (2012) (noting that disagreement with the way the Board weighed evidence does not demonstrate clear error or an inadequate statement of reasons and bases).

C. The Board provided an adequate statement of reasons or bases for denying a rating in excess of 50% for PTSD since February 19, 2015.

The Board concluded that since February 19, 2015, Appellant's social and occupational impairment most nearly approximates a 50% rating and does not result in deficiencies in most areas consistent with a 70% rating. [R. at 15, 17]. The Board considered Appellant's symptomatology, to include his impairment with work and social relationships, but found that there was no evidence of an inability to establish and maintain effective relationships as evidenced by his good relationship with his wife and relationship with his children. [R. at 16]. The Board also discussed his work suspension as a result of spraying diesel fuel on a coworker, but noted that Appellant planned to return to work and the February

2015 VA examiner's opinion that despite this incident, Appellant's PTSD and other mental disorders resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, which is consistent with a 30% rating. [R. at 16-17]; [R. at 49]. The Board recognized Appellant's deficiencies, but concluded that overall the evidence indicated impairment contemplated by the 50% rating. [R. at 17].

Appellant argues that the Board did not explain why he was not entitled to a 70% rating after February 19, 2015. App. Br. at 19. However, reading the Board decision as a whole, it is clear that the Board found Appellant's symptomatology no longer warranted a 50% rating as evidenced by the February 2015 VA examination. [R. at 16-18]. *See Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) (en banc) ("A Board statement generally should be read as a whole."), *rev'd on other grounds by Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014); *Janssen*, 15 Vet.App. at 379. Indeed, when reading the February 2015 VA examination, it is evident that Appellant's symptomatology improved when compared to the July 2011 VA examination. *Compare* [R. at 48-54 (February 2015 VA Examination)] *with* [R. at 209-22 (July 2011 VA Examination)]. For example, the February 2015 VA examiner noted that Appellant's depression had decreased over the past year. [R. at 50].

Appellant also points to a single report in the February 2015 VA examination that he has suicidal thoughts without intent or plan. [R. at 51, 53]; App. Br. at 19. However, the Board did not ignore this evidence. [R. at 14]. Moreover, the mere

presence of suicidal ideation does not dictate that a rating in excess of 50% is warranted. Although suicidal ideation is explicitly listed as a symptom for a 70% rating, the rating is not warranted unless Appellant's PTSD results in occupational and social impairment with deficiencies in most areas. 38 C.F.R. § 4.130; *see Vazquez-Claudio*, 713 F.3d at 117.

Appellant also argues that the Board did not adequately address evidence of arguments with coworkers, alleging that they more closely approximate a 70% or 100% rating after February 2015. App. Br. at 20-21. However, as discussed above, the Board considered and addressed this evidence and concluded that Appellant's overall level of disability more nearly approximates the 50% rating. [R. at 16-17]. Additionally, Appellant's 50% rating specifically contemplates occupational and social impairment with reduced reliability and productivity due to symptoms such as impaired judgment and difficulty establishing and maintaining effective work relationships. 38 C.F.R. § 4.130. As such, Appellant merely disagrees with how the Board weighed this evidence. *See Washington*, 19 Vet.App. at 368; *Owens*, 7 Vet.App. at 433. Similarly, Appellant simply disagrees with the Board's treatment of his report that "[h]e is hoping to go back to work in a few days" after his recent suspension from work. [R. at 50]; App. Br. at 20-21. He fails to adequately explain why the Board was prohibited from considering this evidence and also ignores the fact that the Board did not solely rely on this statement to deny a rating in excess of 50% for this period. Instead, the Board denied a rating in excess of 50% because Appellant's symptomatology no longer

resulted in occupational impairment with deficiencies in most areas, as evidenced by his improved symptomatology at the February 2015 VA examination and that examiner's opinion that Appellant's occupational impairment was best summarized as an occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. [R. at 16-17].

Finally, although Appellant argues that the Board did not explain the standard it used to determine that he experienced occupational and social impairment with reduced reliability and productivity for this period, as well as for the period prior to July 2011, App. Br. at 21-24, his argument is unpersuasive. The standards and symptoms used to evaluate the differences between a 50% rating and a 70% rating are contained in 38 C.F.R. § 4.130. *See Mauerhan*, 16 Vet.App. at 442 (in evaluating mental disorders such as PTSD, the Board must consider all the evidence of record, determine the nature of the appellant's disability picture, and then look to the list of symptoms outlined in the diagnostic criteria as examples that can provide guidance in estimating the severity of the appellant's condition); *see also Vazquez-Claudio*, 713 F.3d at 117 (holding that "symptomatology should be the fact-finder's primary focus when deciding entitlement to a given disability rating" under § 4.130, but that it still "requires an ultimate factual conclusion as to the veteran's level of impairment in 'most areas,'" and explaining that the rating criteria distinguishes between disability levels "by the frequency, severity, and duration of their associated symptoms"). The Board clearly explained the legal standard, [R. at 5-7], and devoted ten pages to discussing Appellant's symptoms

and their effects, [R. at 9-18]. Appellant's argument that he does not understand the rules and standards that apply to differentiating between the ratings for mental disorders is without merit.

Additionally, Appellant's reliance on *Hood v. Brown*, 4 Vet.App. 301 (1993), is misplaced. App. Br. at 22. In *Hood*, the Court found that the Board's reasons and bases for its decision were inadequate because it had simply concluded that the current rating adequately encompassed the appellant's symptomatology without further explanation. *Id*. at 303-04. In contrast, and as discussed in detail above, here the Board reviewed all of the evidence relevant to Appellant's claim and provided significant discussion as to why his particular symptoms did not warrant a higher rating. *See* [R. at 9-18].

D. The Board provided an adequate statement of reasons or bases for denying entitlement to TDIU.

TDIU is available to a disabled veteran whose "schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a). This Court has held that the "the central inquiry in determining whether a veteran is entitled to a TDIU rating is whether that veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown,* 5 Vet.App. 524, 529 (1993); *see* 38 C.F.R. § 4.16(b) ("It is the established policy of the Department of Veterans Affairs that all

veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.").

Additionally, "[w]hether a claimant is unable to secure or follow substantially gainful employment is a finding of fact that this Court reviews under the 'clearly erroneous' standard." *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015). Under the "clearly erroneous" standard, the Court cannot overturn the Board's factual finding if it is supported by a plausible basis in the record, even if the Court may not have reached the same factual determination. *See id.* at 286; *Washington*, 19 Vet.App. at 366; *Gilbert*, 1 Vet.App. at 53.

The Board considered the evidence of record and plausibly denied entitlement to TDIU. [R. at 19-23]. Specifically, the Board considered Appellant's statement that he is unable to secure or follow any substantially gainful employment due to his service-connected PTSD and hearing loss, but found him not credible. [R. at 21-22]. Additionally, the Board acknowledged that Appellant's service-connected disabilities impact his employability, but concluded that "the most probative evidence of record weighs against a finding that the [Appellant's] service-connected disabilities prevented him from securing or following any substantially gainful employment." [R. at 23].

Appellant argues that the Board erred in its credibility determination because its analysis is inconsistent with the evidence of record. App. Br. at 25-27. The Board noted that Appellant's statements that he is unable to work because of his service-connected disabilities contradict his statements that he retired in April 2008

because of his age and other non-disability related reasons. [R. at 21-22]; *compare* [R. at 347 (September 2009 statement in support of TDIU claim)] *and* [R. at 354 (July 2009 TDIU application)] *with* [R. at 323 (April 3, 2009, treatment record noting Appellant's statement that he is not working because of a union benefits issue)]; *and* [R. at 292 (January 2010 VA examination report noting that Appellant retired because of age and not getting enough work)]; *see Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010) (holding that the Board "must consider lay evidence, but may give it whatever weight it concludes the evidence is entitled to."); *Burger v. Brown*, 5 Vet.App. 340, 342 (1993) (the Board "as fact finder, is required to weigh and analyze all the evidence of record"). The Secretary agrees that Appellant's employment as a truck driver in a test fleet from 2011 until 2013 does not necessarily contradict his 2009 statements; however, Appellant's statements to medical professionals that he stopped working because of issues unrelated to his disabilities contradict his statements in support of his TDIU claim. Thus, the Board's finding that Appellant's statements made in conjunction with his application for TDIU were not credible and are entitled to less weight because they are inconsistent with his statements made in a treatment setting is supported by the record and an adequate statement of reasons or bases. [R. at 21]; *see Caluza v. Brown*, 7 Vet.App. 498, 511 (1995) (explaining that a witness's credibility can be impeached by a showing of bias), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991) (stating that pecuniary

interest "may affect the credibility of testimony," but may not itself disqualify a witness).

To the extent Appellant argues that the Board was required to address whether Appellant's employment was marginal, the evidence does not reasonably raise that issue. *See* [R. at 321 (February 25, 2009, treatment record noting that Appellant misses work and "will work on a plan to return to work part-time")]; *Robinson v. Peake*, 21 Vet.App. 545, 552-53 (2008) *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Solomon v. Brown*, 6 Vet.App. 396, 402 (1994). Whether Appellant is self-employed or working part-time, the relevant issue is whether he is capable of substantially gainful employment. 38 C.F.R. § 4.16(a); *see also Hatlestad*, 5 Vet.App. at 529. In addition to Appellant's lay statements and work history, the Board considered the VA examiners' opinions of April 2008, February 2010, January 2010, and February 2015 that while Appellant's PTSD impacted his ability to work, it did not prevent him from employment. [R. at 22]. Despite Appellant's suggestion otherwise, there is no evidence that Appellant's hearing loss prevents him from substantially gainful employment. *See* App. Br. at 28. As the Board noted, the fact that the February 2015 VA examiner opined that Appellant might be excluded from some occupations that require normal hearing if he had to change career fields is not probative where there is no evidence that Appellant is unable to work as a truck driver. [R. at 22]; *see* [R. at 67].

Moreover, as the Board pointed out, the evidence does show that Appellant has been working throughout the appeal period. [R. at 21-22]; *see* [R. at 182 (October 2010 Vet Center record)]; [R. at 244 (243-46) (December 2010 VA treatment record)]; [R. at 790 (789-92) (November 2011 VA treatment record)]; [R. at 50 (February 2015 VA PTSD examination)]; [R. at 67 (February 2015 VA hearing loss examination)]. Therefore, based on its weighing of the lay and medical evidence of record, the Board reasonably concluded that "the most probative evidence of record weighs against a finding that the Veteran's service-connected disabilities prevented him from securing or following any substantially gainful employment," and plausibly denied entitlement to TDIU. [R. at 23]; *see Pederson*, 27 Vet.App. at 286; *Washington*, 19 Vet.App. at 366.

E. Appellant has abandoned all issues not argued in his brief.

It is axiomatic that issues not raised on appeal are abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Because Appellant limited allegations of error to those noted above, he has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007).

V. CONCLUSION

In light of the foregoing, Appellee, Peter O'Rourke, Acting Secretary of Veterans Affairs, asks the Court to affirm the June 22, 2017, Board decision.

Respectfully submitted,

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