IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RALPH A. FALU,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-2020
	)	
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the June 15, 2017, Board of Veterans' Appeals (Board or BVA) decision which denied entitlement to service connection for an acquired psychiatric disorder, including post traumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant appeals the June 15, 2017, Board decision denied entitlement to service connection for an acquired psychiatric disorder, including PTSD. (Record (R.) at 2-19).

In his brief, Appellant does not challenge the findings in the BVA decision denying entitlement to service connection for a low back disorder or a total disability rating based on individual unemployability due to a service-connected disability (TDIU) and the Court should dismiss the appeal of these claims as abandoned. (Appellant's Brief (App. Br.) at 1-15); *Pederson v. McDonald,* 27 Vet.App. 276, 284-85, n.3 (2015) (en banc); *see Seri v. Nicholson*, 21 Vet.App. 441, 445 (2007). Although Appellant states that the Board erred in denying TDIU in the Summary of the Argument of his brief, (App. Br. at 3), he fails identify any law or regulation that was wrongfully applied by the Board, nor does he offer any legal or factual challenge to the Board's denial of TDIU. Thurs, the undeveloped assertion of error regarding TDIU does not warrant detailed analysis by the Court and should be considered waived. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006) (terse or undeveloped argument does not warrant detailed analysis by Court and is considered waived); *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006).

B. Background

Appellant had active duty from August 1972 to May 1976. (R. at 4171). He requested entitlement to service connection for PTSD in April 2007. (R. at 3996). In June 2008, the Department of Veteran Affairs (VA) Regional Office (RO) issued a rating decision denying entitlement to service connection for PTSD, with anxiety, insomnia, emotional stress, and short-term memory. (R. at 3887-94). Appellant

submitted a Notice of Disagreement (NOD) in July 2008. (R. at 3804-05). The RO issued a Statement of the Case (SOC) in February 2010, (R. at 3521-45), and Appellant filed a substantive appeal in April 2010. (R. at 3472-75).

Appellant was afforded a personal hearing before the Board in June 2011. (R. at 3274-90). During this hearing, Appellant testified that, in 1975, he and fellow soldiers were almost killed in a car accident. (R. at 3283 (3274-90)). He reported that he experienced flashbacks regarding this event. *Id*.

In August 2011, the Board issued a decision remanding Appellant's acquired psychiatric condition claim for additional development. (R. at 3249-63).

In a February 2012 statement, Appellant reported that, while in service, a car crashed through the building where he was working and that he was injured in his right leg and arms. (R. at 3114 (3114-15)). He stated that he was traumatized by the incident. *Id*.

In a statement by the Defense Personnel Records Information Retrieval System (DPRIS), it was noted that there was no report of an accident from July 1975 to September 1975 where a vehicle crashed into a building where Appellant was working and there was no report of a car accident hitting Appellant or other workers. (R. at 2983). Casualty data did not list Appellant as wounded or injured. *Id*. VA issued a memorandum in April 2015 summarizing the findings by DPRIS and determining that there was a lack of information corroborating stressors associated with a PTSD claim. (R. at 2969).

The RO issued a Supplemental SOC (SSOC) in April 2015. (R. at 2960-64). The Board remanded Appellant's claim for additional development in February 2016. (R. at 2504-10). The RO issued an SSOC in October 2016. (R. at 1309-22).

In June 2017, the Board denied entitlement to service connection for an acquired psychiatric disorder, including PTSD. (R. at 2-19). This appeal followed.

III. ARGUMENT

The Court should affirm the Board's decision denying Appellant's claim for entitlement to service connection for an acquired psychiatric disorder, including PTSD. Appellant bears the burden of persuading the Court that the Board decision on appeal is tainted by prejudicial error, but he has not demonstrated any error which would warrant remand or reversal. *Sanders v. Shinseki*, 129 S.Ct. 1696, 1705-06 (2009) (party attacking agency determination has burden of showing error is harmful).

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disability. *See Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 3.303(a).

Appellant argues that the Board failed to "administer a broad interpretation of the law to establish service connection where a reasonable doubt arises regarding service origin." (App. Br. at 5-8). He contends that there was an approximate balance of evidence regarding the credibility of his in-service stressor and the Board erred in applying the benefit-of-the-doubt doctrine. (App. Br. at 8). However, the Board made a factual finding that Appellant's purported in-service stressor of a motor vehicle accident and injuring himself as well as witnessing injuries to others was not credible because contemporaneous records were incompatible with the claimed stressor and Appellant had provided an inconsistent history as to the nature of the accident. (R. at 15 (2-19)). A DPRIS statement noted that there was no report of an accident from July 1975 to September 1975 where a vehicle crashed into a building where Appellant was working, there was no report of a car accident hitting Appellant or other workers, and casualty data did not list Appellant as wounded or injured for this time period. (R. at 2983). These findings were summarized in an April 2015 VA memorandum. (R. at 2969). It is the Board's duty to assess the probative value of the evidence and the Board had a plausible basis in finding that Appellant's in-service stressor was not credible. *See Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010); *Washington,* 19 Vet.App. at 367-68; *Madden v. Gober,* 125 F.3d 1477, 1481 (Fed. Cir. 1997). Appellant's disagreement as to how the Board weighed the evidence of record regarding his in-service stressor does not rise to the level of satisfying the criteria required to

hold that the BVA decision was clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Thus, Appellant has failed to show that the evidence was in relative equipoise regarding his in-service stressor.

Since the Board properly determined that the evidence in this case was not in relative equipoise, the benefit-of-the-doubt doctrine is not applicable. *Fagan v. Shinseki,* 573 F.3d 1282, 1289 (Fed. Cir. 2009); *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (explaining that the benefit of the doubt standard of proof is not for application when the Board determines that a preponderance of the evidence weighs for or against a claim); 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102. When the Board has determined that the preponderance of the evidence weighs against an appellant's claim, it necessarily has determined that the evidence is not nearly equal. *Id*. Again, Appellant merely disagrees with how the Board weighed the evidence of record and has not demonstrated that there was clear error in this case.

Appellant also contends that the Board failed to adequately consider medical evidence of PTSD diagnoses provided by various physicians, including Dr. John Davis, Dr. Mahammad Asif Yasin, and Dr. Daniel Dansak. (App. Br. at 8-12); (R. at 2733-38, 47-50, 34-37, 86-89, 44-46). He argues that the Board "failed to consider" these opinions. (App. Br. at 9-12). He asserts that Dr. Davis' opinion was valid relative to the history and observation from other sources and that Dr. Yasin and Dr. Dansak's opinions was entitled to consideration and weight as

competent medical evidence. *Id*. Again, Appellant is arguing as to how the Board weighed the evidence of record, which is not remandable error.

The Board did consider these opinions in the decision on appeal, but determined that the PTSD diagnoses provided by the various physicians were based on a stressor that the Board deemed not credible. (R. at 14-15 (2-19)). As noted above, the Board weighed the evidence of record and determined that the purported stressor was not credible and that the subsequent PTSD diagnoses regarding this stressor was not probative. (R. at 15 (2-19)). Although Appellant argues that the record establishes that Appellant's account of his in-service stressor was credible, the Board weighed the evidence of record and Appellant has failed to show that the Board's findings are clearly erroneous and not plausibly based. *Gilbert*, 1 Vet.App. at 53.

Although Appellant requests a grant of his claim for entitlement to service connection for an acquired psychiatric disorder, including PTSD, he has failed to present any contentions of error which would warrant reversal. (App. Br. at 1-15). Reversal is an appropriate remedy only when there is only one permissible view of the evidence and that view is contrary to the BVA's finding, which does not describe this case. *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (reversal is appropriate only where, based on the entire evidence, the Court is left with the definite and firm conviction that a mistake has been committed); *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004); *Johnson v. Brown*, 9 Vet.App. 7, 11 (1996).

Appellant has not identified any law or regulation that was wrongfully applied by the Board, nor does he offer any legal or factual challenge to demonstrate that the BVA decision is clearly erroneous. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006); *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006).

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261 (b)(2).

IV. CONCLUSION

For the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully requests this Court to issue an order affirming the decision on appeal.

Respectfully submitted,

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