IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THOMAS J. BUERGER,

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

RICHARD J. HIPOLIT
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

JOAN E. MORIARTY
Deputy Chief Counsel

CRYSTAL LIU
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027C)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7101

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RECORD BEFORE THE AGENCY CITATIONS

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THOMAS J. BUERGER,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 18-6733
	)	
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 August 2, 2018, Board of Veterans' Appeals (Board) Decision should be affirmed to the extent that it denied entitlement to service connection for an acquired psychiatric disorder and ischemic heart disease.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). However, the Court lacks jurisdiction to review the Board's decision to reopen the service connection claim for posttraumatic stress disorder (PTSD). *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse

findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). Further, the Court lacks jurisdiction to review the remanded claims for an increased rating in excess of 40 percent for a lumbosacral strain and to a total disability rating based on individual unemployability. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (Court lacks jurisdiction over claim remanded by the Board).

B. Nature of the Case

Appellant, Thomas J. Buerger, appeals the August 2, 2018, Board's decision to the extent that it denied entitlement to service connection for an acquired psychiatric disorder, to include PTSD, and ischemic heart disease. [Record Before the Agency (R.) at 4-18]. The Board found that Appellant "did not participate in combat and there is no credible supporting evidence that his claimed stressors occurred." [R. at 5 (4-18)]. The Board also found that Appellant did not serve in the Republic of Vietnam and was not otherwise exposed to herbicide. *Id.*

C. Statement of Facts and Procedural History

Appellant served in the U.S. Navy as a sonar technician from August 1967 to July 1969 and received an honorable discharge. [R. at 1554]. From August 1967 through February 1968, Appellant underwent recruit training and basic electricity and electronic training at the Navy Training Center in Great Lakes, Illinois. *See* [R. at 1554; 1660 (1658-60); 1673; 1674]. From February through September 1968, Appellant attended the Navy Fleet Sonar School in Key West, Florida. [R. at 1660 (1658-60); 1673]. While at the Fleet Sonar School, Appellant

enrolled in a special enlisted oceanographic course and graduated last in his class of 19 persons with a final mark of 62.63 (63 passing). [R. at 1554; 1653-54 (1651-56); 1661].

In late September 1968, Appellant reported at the naval facility in Cape Hatteras, North Carolina. [R. at 1660 (1658-60)]; *see also* [R. at 2917 (2917-18)]. In October 1968, Appellant was admitted to the Naval Hospital for 6 days in Portsmouth, Virginia. [R. at 2917 (2917-18)]. Appellant reported having back pain that started a week prior due to working 14 to 16 hours a day filling and carrying sand bags at Cape Hatteras for hurricane precautions. *Id.* In early November 1968, Appellant reported at the Naval Facility in Nantucket, Massachusetts, to complete a tour of normal shore duty. [R. at 1652 (1651-56); 1660 (1658-60)].

In January 1969, Appellant requested a psychiatric evaluation. [R. at 2901]. The examiner reported that Appellant was manifesting symptoms of acute anxiety-depression. *Id.* Due to the diagnosis and Appellant's "repeated disciplinery [sic] offenses," in February 1969 the Navy requested the Neuropsychiatric Clinic at the Naval Hospital in Chelsea, Massachusetts ("Chelsea Naval Hospital"), to evaluate whether Appellant was fit to remain in a security billet. [R. at 2900].

That same day, Appellant was admitted to the Chelsea Naval Hospital with an initial diagnosis of anxiety reaction. [R. at 2898 (2898-99)]; *see also* [R. at 1659 (1658-60)]. On admission, Appellant's "mental status examination revealed a depressed and tearful young man who was fully oriented"; "[m]uch of his speech seemed artificial and his interactions were rather manipulative"; and "[t]here was

no evidence of psychotic or organic ideation." [R. at 2898 (2898-99)]. Appellant reported becoming depressed because his sister was sick and dying; his father's business was doing poorly; his job at Nantucket was "too repetitive" and "has no future for him;" and "[h]e has been unable to make any friends at Nantucket." *Id.* In response, Appellant would act out petty legal offenses, such as unauthorized absences. *Id.* Appellant also "stated that his prime reason for coming to his hospital from his point of view was to get out of the service." [R. at 2899 (2898-99)]. After twelve days of observing and treating Appellant, a conference of staff psychiatrists revised Appellant's diagnosis to passive aggressive personality, with depressive features manifested by anger turned upon himself, small legal difficulties, insomnia, depression, and anger at the service, with resulting poor work performance. *Id.* Appellant was deemed unfit to have a security clearance but not unfit to require discharge from duty. *Id.*; *see also* [R. at 1652 (1651-56)].

In March 1969, after nearly a month of treatment, Appellant was discharged from the Chelsea Naval Hospital and returned to duty. [R. at 1659 (1658-60); 2899 (2898-99)]. The next day, Appellant reported to sick call because he had trouble sleeping and heard voices during night. [R. at 2927]. The day after that, Appellant reported to sick call stating, "I can't take it anymore. Please send me back to the hospital." *Id.* Appellant then returned to the Chelsea Naval Hospital. [R. at 1659 (1658-60); 2895 (2895-97)].

During Appellant's second admission to the Chelsea Naval Hospital in March 1969, Appellant reported that "he felt his father hated him, was trying to

control him, and never gave him anything." [R. at 2896 (2895-97)]. The examiner reported that Appellant "identified the Navy with his father and felt that the Navy treated him the same way that his father had treated him, and that he had to fight back." *Id.* After a period of observation and treatment, a conference of staff psychiatrists agreed that Appellant had a long-standing character disorder. *Id.* The diagnosis was passive aggressive personality, existed prior to entrance, not aggravated by service, with depression. *Id.* This disorder was judged to be "manifested by an inability to tolerate authority, uncontrollable rage reactions, markedly labile emotional status, impulsive destructive actions, inability to tolerate independent duty, moderate external precipitating stress (routine Naval duty and death of sister); marked predisposition (very unstable home situation, frequent broken home, long history of intolerance for authority, frequent temper outbursts); marked impairment for military life (unsuitable to further military duty); [and] not in need of further hospitalization." *Id.*

In April 1969, Appellant appeared before the Medical Board which agreed with the prior diagnosis of passive aggressive personality. [R. at 2896 (2895-97); 2929 (2929-30)]. The Medical Board further agreed that the passive aggressive personality was an inherent, pre-existing defect. [R. at 2896 (2895-97); 2929 (2929-30)]. Finally, the Medical Board agreed that the condition rendered Appellant unfit for service. [R. at 2896 (2895-97); 2929 (2929-30)]. In addition, Appellant was found to have a chronic lumbosacral strain that dated to a fall in April 1968. [R. at 2897 (2895-97)]. Appellant acknowledged the Medical Board's

determination that he was unfit for duty and that he would be presented to a Physical Evaluation Board. [R. at 2770].

In May 1969, Appellant reported at the Naval Headquarters in Boston, Massachusetts, to appear before the Physical Evaluation Board. [R. at 1659 (1658-60)]. The Physical Evaluation Board determined that Appellant was unfit for service due to passive aggressive personality and Appellant was also unfit to perform the duties of his rating due to a lumbosacral strain in the spine rated at 10%. [R. at 2912]. In July 1969, Appellant was discharged from the Navy. [R. at 1554; 1658 (1658-60); 1673]. Appellant's Certificate of Release or Discharge from Active Duty states that Appellant served 0 days of foreign and sea service. [R. at 1554].

In February 2006, Appellant applied for service connection for PTSD. [R. at 1622 (1615-23)]. Enclosed was a psychiatric evaluation report dated February 2006 from a private physician, William B. Rogers, M.D. [R. at 1616-20 (1615-23)]. The report stated that Appellant was "medically discharged from duty due to a back injury received during a hurricane while on active duty"; that Appellant served in Vietnam for "river based surveillance" for "6 weeks in 1968" and was "stationed with a Seal Team"; that Appellant was "wounded from a ground attack" while in Vietnam, during which a "concussion left him unconscious"; that Appellant was placed in a medevac helicopter that got shot down and was then placed on a second helicopter for evacuation; and that Appellant has "vague memories of struggling for breath amidst a group of evacuees." [R. at 1616, 1618 (1615-23)].

The report further stated that Appellant "was stationed at Nantucket for submarine surveillance duties" and that he recalled "both drills and actual incidences of discovery of Russian submarines that were subsequently tracked and attacked by elements of the American anti-submarine forces." [R. at 1618 (1615-23)]. The report stated that Appellant then "began having intrusive nightmares and disorganizing panic attacks having to do with finding and destroying enemy submarines." *Id.* In addition, the report stated that Appellant's psychiatric problems quiesced until about 1971, and that he self-medicated with hallucinogens and marijuana. *Id.* Dr. Rogers stated that Appellant had elements of combat-related PTSD and diagnosed PTSD and rule out bipolar II disorder. [R. at 1618, 1620 (1615-23)].

Subsequently, in March and May 2006, the Department of Veterans Affairs (VA) sent Appellant letters requesting more details about the combat-related incidents described in the psychiatric evaluation report. [R. at 1601-02; 1608-13]. Appellant did not respond. In June 2006, VA determined that there was no objective evidence to corroborate Appellant's factual allegations as reported in the psychiatric evaluation report, and that Appellant's records instead indicate that he did not have any foreign service or encounters with enemy forces and that his lumbar strain was due to a fall during boot camp. [R. at 1600]. In July 2006, VA determined that the information provided by Appellant was insufficient to send to the Joint Services Records Research Center (JSRRC) or to research the case for a Marine Corps record. [R. at 1599]. In a July 2006 Rating Decision, the Regional

Office (RO) denied Appellant's claim. [R. at 1592-96]. Appellant did not appeal the July 2006 Rating Decision.

In March 2008, Appellant reapplied for service connection for PTSD. [R. at 1556-83]. He stated that he was hospitalized at a naval hospital during service due to PTSD, although "it wasn't described as 'PTSD' at that time," and that "[n]aval physicians stated at the time that I was suffering from the guilt associated with those that I did kill or those that I may have killed." [R. at 1570 (1556-83)]. In addition, Appellant attached a statement regarding his PTSD stressors. [R. at 1575-77 (1556-83)]. Appellant explained that while he was at the Navy Sonar School, he discovered that he "had the ability to see things in Lofar grams that others couldn't see until I pointed them out to them"; that after he graduated from oceanography school, "[h]e and a guy named Nash was approached by a commander (can't remember his name), to use our skills in trying to see if river traffic along the Mekong river in Viet Nam data could be read the same way as ocean data"; that he then went to Vietnam with Nash and "SEAL teams would take us up river where we would string out these buoys to monitor river traffic"; that he later "came under mortar attack" and was rescued by a helicopter with dead or injured persons on top of him; that the helicopter got shot down and he was thrown onto the ground; that he went to the Port Smith Naval Hospital for a back injury and that his "cover story" was that he "injured [his] back during a hurricane at Cape Hattaras [sic]"; that he was then transferred to the Nantucket listening post where he "was personally able to detect a number of submarines that others had

overlooked"; and that upon realizing that the Russian submarines he detected were being sunk by American forces, he started having "dreams of their ships filling with water." [R. at 1575 (1556-83)]. Appellant then reported that he "woke up one day in the Chelsea Naval Hospital" and "started receiving psychiatric treatment for all the young men I had helped kill"; that he was eventually discharged but two days later he woke up back again in the same hospital; that he was placed in the "lock up ward" while at the hospital; and that he was asked if he wanted to leave the military, which he felt the answer was "a no brainer, because I didn't like being locked up." [R. at 1577 (1556-83)]. The next month, in April 2008, Appellant sought treatment for PTSD at a VA medical facility relating substantially the same stressor information. [R. at 445-53].

In February 2009, Appellant underwent a VA PTSD examination. [R. at 1366-73]. The examiner diagnosed major depressive disorder, and personality disorder, not otherwise specified. [R. at 1372 (1366-73)]. The examiner opined that it was less likely than not that the PTSD diagnosed by the private physician was caused by or a result of any military experiences. *Id.* The examiner instead opined that Appellant continued to manifest behaviors consistent with the personality disorder noted by the Navy psychiatrists in 1969, which was not caused by service. *Id.*

In April 2009 Rating Decision, the RO reopened the previously denied service connection claim for PTSD and denied the claim. [R. at 1349-57]. The RO found that "the evidence continues to show this condition was not incurred or

aggravated by military service" because Appellant's service records did not show that he served in combat or was exposed to any other stressful experiences during service, and Appellant's statements regarding of his in-service experiences were uncorroborated. [R. at 1355-56 (1349-57)]. In August 2009, Appellant filed a Notice of Disagreement. [R. at 1294-302]. In a November 2009 Statement of the Case, the RO continued to deny the claim. [R. at 1261-91]. Appellant timely perfected his appeal. [R. at 1250].

In December 2012, Appellant filed a new claim for service connection for ischemic heart disease due to exposure to Agent Orange while serving in Vietnam. [R. at 1079 (943-1079)]. Appellant also enclosed medical health records noting diagnoses of atherosclerotic cardio vascular disease and possible ischemia. *See* [R. at 1073-75 (943-1079)].

Also in December 2012, Appellant underwent a second VA PTSD examination. [R. at 775-84]. The diagnosis was recurrent major depression. [R. at 776 (775-84)]. The examiner opined that the major depression was less likely than not caused by or a result of service or a continuation of mental health treatment in service. [R. at 781 (775-84)]. The examiner explained,

> Service treatment records show his depression in 1969 to be situational in nature, related to his sister's terminal illness; his father's business reversals; disliking his job in service as being too restrictive and having no future for him; and becoming involved in petty legal offenses, such as going unauthorized absent. There was nothing in his service treatment records to suggest his depression and anxiety reactions were anything other than situational in nature, worsened by "an inherent, preexisting defect" of personality. In this examiner's opinion: situational stressors over forty years ago are not causing his

> depression now, or at the time of his 2009 exam; and personality defects cannot be used to claim a service connection for depression today.

Id. The examiner further stated that Appellant "is not a very credible historian" as Appellant would report that "he has terrible nightmares of drowning and is claustrophobic, waking up gasping for air due to dreaming he's going down with the Russian submariners; then later describ[es] his love of scuba diving with his wife, a peaceful and enjoyable activity for him." *Id.* In January 2013 Supplemental Statement of the Case (SSOC), the RO continued the denial of service connection for PTSD. [R. at 768-73].

In July 2013, VA sent Appellant a letter requesting more information about his service in Vietnam, specifically if he had served on any Navy ships that entered Vietnam. [R. at 731-34]. Appellant did not respond. In a September 2013 Rating Decision, the RO denied Appellant's claim for ischemic heart disease because there was no evidence that Appellant served in Vietnam or was otherwise exposed to herbicides, and there was no evidence of a heart condition in service. [R. at 712-20]. In October 2013, Appellant filed a Notice of Disagreement challenging the September 2013 Rating Decision. [R. at 696-98]. In addition, the RO issued another SSOC denying Appellant's claim for PTSD. [R. at 687-93].

In March 2015, VA determined that there was insufficient information concerning Appellant's Vietnam service or Agent Orange exposure to send to JSRRC or the National Archives and Records Information. [R. at 677]. In a May 2015 Statement of the Case, the RO denied Appellant's service connection claim

for ischemic heart disease. [R. at 650-76]. In July 2015, Appellant perfected his appeal. [R. at 644-49].

In May 2017, Appellant appeared at a hearing before the Board via a video conference. [R. at 541-90]. Appellant stated that his back injury was due to a "chopper crash in Vietnam," and since the mission he was on was "top secret," his service records were "clean[ed]" and he was told by a commander to say, "I hurt my back in a hurricane at Cape Hatteras." [R. at 552 (541-90)]. Appellant reported that after graduating oceanography school, he went to Cape Hatteras. *Id.* Within the next two days, a commander asked him and Nash, a fellow classmate, to go on a "special mission" to "try out this new equipment" because they both had "a form of dyslexia that allowed [them] to read the grams that this land-based sonar used better than other people." [R. 552-53 (541-90)]; *see also* [R. at 570 (541-90)] ("[W]e were like the two guys that could read the grams better than anybody else."). He stated that he then flew from Cape Hatteras to Vietnam and was there for "roughly six weeks before the mortar attack." [R. at 553 (541-90)]. Appellant recalled being under a mortar attack, then being "on a chopper with somebody laying on top of me that's been wounded or something," then "a large explosion" and "hit[ting] the ground," and then finally "waking up in Portsmouth Naval Hospital in traction." [R. at 553-54 (541-90)]. Appellant recalled that he "was in traction for six weeks." [R. at 576 (541-90)]; *see also* [R. at 578 (541-90)] ("About six weeks in traction, orthopedic ward").

After he recovered at the Portsmouth Naval Hospital, Appellant stated that he was transferred to Nantucket, Massachusetts, where he started doing his "regular duty as a sonar tech." [R. at 554 (541-90)]. He stated that, during that time, he "helped sink Russian submarines in response to them sinking ours." [R. at 555 (541-90)]. He added, "[a]t first, there was no guilt involved but then it finally dawned on me, I'm killing guys I'm not even at war with." *Id.* He further stated, "there was two confirmed kills for sure and there was a possible third but they could never find the wreckage so they never really counted it, I guess, and that's when I lost it and ended up in the psychiatric ward." *Id.* Appellant then stated that at the psychiatric ward, "they tricked me into leaving the Navy." *Id.*

In August 2018, the same Board member that conducted the May 2017 video conference authored the Board's decision denying service connection for PSTD and ischemic heart disease. [R. at 4-18]. The Board found that Appellant provided more details about his alleged Vietnam experiences since his previous service connection claim for PTSD was denied in July 2006, and thus reopened the claim. [R. at 7 (4-18)]. The Board noted that Appellant claimed two stressors via various statements and hearing testimony: (1) combat exposure in Vietnam and (2) detection of Russian submarines that lead to the deaths of hundreds of sailors. [R. at 9 (4-18)]. However, the Board found that Appellant's statements and testimony were "incredible." [R. at 10 (4-18)].

In addition, the Board found that Appellant's statements were not only "not corroborate[d]" but also "contradict[ed]" by his service personnel records. *Id.*

Specifically, the Board noted that the service personnel records show "[h]is duty stations were all in the continental United States and there is absolutely no evidence of foreign and/or sea service. There is also no indication he received any awards or medals confirming service in Vietnam or participation in combat." *Id.*; *see* [R. at 1554; 1658-60; 1673]. The Board further noted that Appellant was hospitalized for an extended period prior to discharge, but none of the progress notes "make[] a mention of overseas service or the claimed stressors. . . . [Instead,] [they] indicate[] he was stateside, did not like his assigned military duties, and did not want to be in the service. [R. at 10 (4-18)]; *see* [R. at 2895-97; 2898-99; 2917-18]. The Board also noted that Appellant asserted that there are no written records pertaining to his stressors, and as such, further attempts to verify the reported stressors would be unnecessary. [R. at 9 (4-18)]; *see* [R. at 552 (541-90)] (testifying Appellant's records were "clean[ed]").

As such, the Board found that Appellant (1) "did not service in Vietnam or in combat"; (2) "there is no credible supporting evidence that the reported stressors occurred"; and (3) Appellant's "claimed stressors are not consistent with the places, types, and circumstances of his service." [R. at 10 (4-18)]. The Board also found that the February 2006 private evaluation report had no probative value as it was based on Appellant's reported history, which the Board deemed not credible. [R. at 13 (4-18)] *see* [R. at 1616-20 (1615-23)]. Overall, the Board concluded that "the preponderance of the evidence shows that the Veteran does not have posttraumatic stress disorder related to an in-service stressor." [R. at 14 (4-18)].

The Board then determined that Appellant's diagnosed major depression was similarly not related to service. [R. at 12-13 (4-18)]. The Board primarily relied on the December 2012 VA examination report, in which the December 2012 opined that the major depression was less likely than not caused by or a result of service and less likely than not due to or a continuation of mental health treatment in service. [R. at 12 (4-18)]; *see* [R. at 781 (775-84)]. The Board noted the examiner's reasoning that Appellant's depression in 1969 was "situational in nature" and the "situational stressors over forty years ago are not causing his depression now." [R. at 12 (4-18)] (quoting [R. at 781 (775-84)]). Overall, the Board determined that "the preponderance of the probative evidence is against finding major depression is related to active service or events therein." [R. at 14 (4-18)].

Finally, the Board denied service connection for ischemic heart disease. [R. at 14-15 (4-18)]. The Board noted Appellant's reports of going on a "'secret mission' in Vietnam but d[id] not find his statements credible." [R. at 14 (4-18)]. The Board also noted that there was no evidence of cardiovascular disease manifesting to a compensable degree within one year following discharge from active service, or any evidence showing direct service connection. [R. at 15 (4-18)]. Ultimately, the Board found that the preponderance of the evidence was against the claim and then denied service connection on a presumptive basis due to Agent Orange exposure, direct basis, and a presumptive basis. [R. at 14-15 (4-18)].

III. SUMMARY OF THE ARGUMENT

The August 2, 2018, Board of Veterans' Appeals (Board) Decision should be affirmed to the extent that it denied service connection for an acquired psychiatric disorder, to include PTSD and major depression, and ischemic heart disease. The Board had an adequate basis for finding Appellant's testimony regarding his two PTSD stressors, (1) combat exposure in Vietnam and (2) killing hundreds of Russian soldiers by detecting the location of Russian submarines, as incredible. Further, the Board's finding that there was a lack of nexus between Appellant's major depression and service is supported by a plausible basis in the record. Finally, the Board adequately found that Appellant was not exposed to Agent Orange, and that Appellant did not present other evidence of service connection for ischemic heart disease. Therefore, this Court should affirm the Board's decision.

IV. ARGUMENT

A. Standard of Review.

The appellant generally bears the burden of demonstrating error in a Board's decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). The appellant's burden also includes the burden of demonstrating that any error by the Board is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

The Board's determination of service connection is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. §

7261(a)(4); *see Rose v. West*, 11 Vet.App. 169, 171 (1998). Similarly, the Board's assessment of the credibility and weight to be given to evidence and whether a medical opinion is adequate are findings of fact that this Court also reviews under the "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 98, 104, 107 (2006). The Supreme Court has held that a finding is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co*., 333 U.S. 364, 395 (1948)). The Supreme Court explained 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." *Id.* at 574.

The Court also reviews whether the Board supported its decision with 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 this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

B. The Board provided an adequate statement of reasons or bases explaining why Appellant was not entitled to service connection for PTSD.

Where the service connection claim is for PTSD, a claimant must present evidence of (1) a current diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between the current symptomatology and the claimed in-service stressor. 38 C.F.R. § 3.304(f).

> If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Id. at § 3.304(f)(2).

> If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Id. at § 3.304(f)(3).

Here, the Board's decision should be affirmed because that decision is supported by a plausible basis in the record and the Board provided an adequate statement of reasons or bases for finding that service connection for PTSD was

not warranted. *See* [R. at 9-13 (4-18)]. The Board noted Appellant's reported stressors via testimony and statements of (1) being exposed to combat while serving in Vietnam and (2) killing hundreds of Russian sailors by detecting the location of Russian submarines, but then explained that it found Appellant's testimony to be "incredible," and as such, had no probative value. [R. at 9-10 (4-18)]. The Board then explained that it also determined that the February 2006 private evaluation report has no probative value because it relied on the same reported history that the it had already found not credible. [R. at 13 (4-18)]; *see* [R. at 1616-20 (1615-23)]. Further, the Board found that, except for Appellant's testimony which it found to be not credible, there was no other evidence that Appellant served in Vietnam, participated in combat, or was exposed to in-service trauma. [R. at 10 (4-18)]. As such, the Board found that Appellant "did not serve in Vietnam or combat" and concluded that Appellant's "claimed stressors are not consistent with the places, types, and circumstances of his service." *Id.*

These statements clearly explain that Appellant failed to satisfy the second element for service connection for PTSD: "credible supporting evidence that the claimed in-service stressor actually occurred." *See* 38 C.F.R. § 3.304(f). Specifically, the statements explain that there is no supporting evidence of the stressors. [R. at 10 (3-18)]. The statements further explain that the regulations allowing for a veteran's lay testimony to satisfy this element were inapplicable because the Board found that Appellant's testimony was not credible and his reported stressors were not consistent with the places, types, and circumstances

of his service. [R. at 10 (3-18)]; *see* 38 C.F.R. § 3.304(f)(2) and (3). As such, these statements "enable a claimant to understand the precise basis for the Board's decision" and "facilitate review in this Court." *See Allday*, 7 Vet.App. at 527.

Contrary to Appellant's assertions, the Board has a duty to determine the credibility and weight of all evidence, and it adequately explained why it deemed Appellant's testimony to be "incredible." *See Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (Fed. Cir. 2006) ("Rather, the Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself, i.e., because of possible bias, conflicting statements, etc."). The Court has held that the Board may consider statements to be of lower probative value where there is a "significant time delay" between the incident and "the date on which the statements were written." *See id.* at 1336. The Court has also held that "the absence of an entry in a record may be evidence against the existence of a fact if such a fact would ordinarily be recorded." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015). Finally, "[i]n the case of oral testimony, a hearing officer may properly consider the demeanor of the witness, the facial plausibility of the testimony, and the consistency of the witness' testimony with other testimony and affidavits submitted on behalf of the veteran." *Caluza v. Brown*, 7 Vet.App. 498, 511 (1995).

Here, the Board also provided an adequate statement of reasons or bases for finding that Appellant's testimony regarding his stressors to be incredible. Regarding the first claimed stressor: combat exposure in Vietnam, the Board noted

that the available records show that Appellant's "duty stations were all in the continental United States" and that he did not receive "any awards or medals confirming service in Vietnam or participation in combat." [R. at 10 (3-18)]; *see* [R. at 1554; 1658-60; 1673]). In addition, while Appellant was hospitalized in prior to discharge for several occasions, the Board noted that the progress notes "make[] no mention of overseas service or the claimed stressors . . . [and] indicate[] he was stateside." [R. at 10 (3-18)]; *see* [R. at 2917-18]. For example, while Appellant stated at the hearing that he hurt his back while evacuating from Vietnam and was told to say he hurt his back in a hurricane, [R. at 552-54 (541-90)], an October 18, 1968, medical record reports back pain for the past four weeks and notes that it is secondary to a longstanding injury, [R. at 2910], and a subsequent October 23, 1968, medical record from the Naval Hospital in Portsmouth, Virginia, states that Appellant reported having back pain for approximately one week prior due to filling and carrying sand bags at Cape Hatteras, North Carolina, as a hurricane precaution. [R. at 2917 (2917-18)]; *see also* [R. at 2907]. Additionally, while Appellant claimed that he stayed at the Naval Hospital in Portsmouth, Virginia, for six weeks after surviving a mortar attack and helicopter crash in Vietnam, [R. at 553-54, 576, 578 (541-90)], the medical record states that Appellant was only at the Naval Hospital for six days. [R. at 2918 (2917-18)].

Regarding the second claimed stressor: causing the deaths of Russian sailors by locating submarines, the Board similarly noted that the progress notes from Appellant's hospitalization "contradict[] the Veteran's reports." [R. at 10 (3-

18)]; *see* [R. at 2895-97; 2898-99]. Although Appellant testified that he "lost it and ended up in the psychiatric ward" due to "guilt" from "killing guys [he's] not even at war with," and was ultimately "tricked into leaving the Navy," [R. at 555 (541-90)], the progress notes note that Appellant "stated that his prime reason for coming to his hospital from his point of view was to get out of the service." [R. at 2899 (2898-99)]. Further, the progress notes do not show that Appellant's reason for going to the psychiatric ward was due to "guilt" from "killing guys [he's] not even at war with." Instead, they explain that it was because Appellant felt his job was "too repetitive" and "had no future," that his sister was dying, and that his father's business was "doing poorly." [R. at 2895 (2895-97); 2898 (2898-99)]. The Board found that "the contemporaneous service records [are] far more probative than the Veteran's testimony which is deemed incredible." [R. at 10 (3-18)].

These statements adequately explain the Board's reasons or bases for determining that Appellant's testimony was not credible. At the outset, the Board was authorized to consider "the facial plausibility of the testimony." *See Caluza*, 7 Vet.App. at 511. The Board additionally pointed out that there are no records or medals confirming Appellant's service in Vietnam or participation in combat, [R. at 10 (3-18)], which ordinarily would have existed. *See Fountain*, 27 Vet.App. at 272 (authorizing the Board to draw inferences "if such a fact would ordinarily be recorded."). Furthermore, the Board found that contemporaneous service records contradicted Appellant's recent testimony, and made the permissible inference that the contemporaneous service records are far more probative than Appellant's

recent testimony nearly 40 years later. [R. at 10 (3-18)]; *see Buchanan*, 451 F.3d at 1336 (holding that the Board may find evidence to be less probative if there was a "significant time delay" between the incident and "the date on which the statements were written."). As such, the statements "enable a claimant to understand the precise basis for the Board's decision" and "facilitate review in this Court." *See Allday*, 7 Vet.App. at 527.

In addition, contrary to Appellant's assertions, the Board properly considered and rejected the February 2006 medical examination because it relied on an inaccurate factual premise. The Court has held that "[a]n opinion based upon an inaccurate factual premise has no probative value." *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993). As explained *supra*, the Board properly determined that Appellant's statements about reported stressors were "incredible." The Board then explained that the February 2006 medical examination relied on the same reported stressors that the Board already deemed incredible and as such warranted no probative value. [R. at 13 (4-18)]; *see* [R. at 1616-20 (1615-23)]. Therefore, the Court should reject this argument.

Appellant argues that the benefit of the doubt doctrine should have been applied. *See* Appellant's Brief (App. Br.) at 4-5. However, the benefit of the doubt doctrine does not require the Board to blindly accept any statements from a claimant as true. As explained *supra*, the Board has an obligation to "determin[e] whether lay evidence is credible in and of itself." *See Buchanan,* 451 F.3d at 1337. Instead, pursuant to the benefit of the doubt doctrine, when after considering all

information and lay and medical evidence of record, "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see* 38 C.F.R. §§ 3.102, 4.3. Here, there was not "an approximate balance of positive and negative evidence" because the Board properly determined that Appellant's testimony and the February 2006 opinion had no probative value. *See* [R. at 14 (3-18)]; *supra*. Instead, there is no probative, positive evidence in favor of Appellant. Therefore, the benefit of the doubt does not apply, and Appellant's argument should be rejected.

Appellant finally argues that the Board should have remanded the case "to get clarification from the military that Mr. Buerger did or did not participate in this top-secret mission." App. Br. at 6. However, "the duty to assist is not a license to continue gathering evidence in the hopes of finding evidence to support the claim." *Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009); *see Gobber v. Derwinski*, 2 Vet.App. 470, 472 (1992). As the Board noted, VA already attempted to get clarification, but it determined in June and July 2006 that there is no objective evidence to corroborate Appellant's allegations and the information provided by Appellant is insufficient to send to JSRRC. [R. at 9 (4-18)]; *see* [R. at 1599; 1600]. Further, as the Board noted, Appellant claimed that there are no official reports of his participation in the top-secret mission. [R. at 9 (4-18)]; *see* [R. at 552 (541-90)]. As such, the Court should reject Appellant's argument for a remand "to

continue gathering evidence in the hopes of finding evidence to support the claim." *Douglas*, 23 Vet.App. at 26.

C. The Board provided an adequate statement of reasons or bases explaining that service connection for major depression was not warranted.

Generally, to establish entitlement to service-connected compensation benefits, a claimant must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service – the so called 'nexus' requirement." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Here, the Board adequately explained why it denied service connection for major depression due to a lack of nexus, the third element for service connection. [R. at 12-13 (4-18)]. There was no evidence in the Record Before the Agency suggesting a positive nexus between Appellant's current major depression and service. The 2012 VA examiner's opinion is the only evidence that touches on the nexus requirement. *See* [R. at 781 (775-84)]. However, as the Board noted, the 2012 VA examiner opined that Appellant's major depression was less likely than not caused by or a result of service, and less likely than not due to or a continuation of mental health treatment in service. [R. at 12 (4-18)]; *see* [R. at 781 (775-84)]. Consequently, the Board determined that "the preponderance of the probative evidence is against finding major depression is related to active service or events

therein." [R. at 14 (4-18)]. Because these statements explain that the available evidence was against finding a positive nexus, they "enable a claimant to understand the precise basis for the Board's decision" and "facilitate review in this Court." *See Allday*, 7 Vet.App. at 527.

Appellant argues that the Board erred because it noted that Appellant's "symptoms of depression were not chronic during service with no explanation of this finding." *See* App. Br. at 6-7. Appellant further argues that Appellant's service related depression stressors cannot be separated from his non-service related stressors. *See* App. Br. at 6-7. As Appellant cites in his brief, the Board stated that although "[s]ervice treatment records document complaints and findings of anxiety and depression . . . following an extensive period of in-service observation and hospitalization, the diagnosis was revised to a personality disorder." App. Br. at 7 n. 2 (citing [R. at 13 (4-18)]). This statement clearly shows that, because the diagnosis was "revised to a personality disorder" following an extensive period of in-service observation, *see* [R. at 13 (4-18); 2895-97; 2898-99], the initial impressions of depression and depression symptoms were erroneous and should not be deemed probative. As such, the source of Appellant's mental discomfort during service is immaterial because they are not attributable to a depression diagnosis. Therefore, the Court should reject these arguments.

Appellant additionally argues that "it is possible for a person to be suffering from both a personality disorder and depression." App. Br. at 7 n.2. However, the competent medical professionals did not diagnose a personality disorder in

addition to depression. Instead, as the Board pointed out, they revised the prior diagnosis to a personality disorder. [R. at 13 (4-18)]; *see* [R. at 2895-97; 2898-99]. The Court should also reject this argument.

D. The Board adequately explained that service connection for ischemic heart disease was not warranted.

As explained *supra*, the Board properly rejected Appellant's testimony that he served in Vietnam. *See* [R. at 10, 14 (4-18)], *see supra*. The Board also noted that there is no evidence of any other in-service exposure to herbicide. [R. at 14 (4-18)]. The Board further noted that there was no evidence of cardiovascular disease manifesting to a compensable degree within one year following discharge from active service, or any evidence showing direct service connection. [R. at 15 (4-18)]. These statements explain that service connection on a presumptive basis due to herbicide exposure was not warranted because there is no evidence of in-service exposure to herbicide, and herbicide exposure could not be presumed because the probative evidence did not establish that Appellant served in Vietnam. The statements also explain that service connection is not warranted for ischemic heart disease on a direct or presumptive basis because Appellant did not present evidence relating to those theories. Thus, these statements "enable a claimant to understand the precise basis for the Board's decision" and "facilitate review in this Court." *See Allday*, 7 Vet.App. at 527.

Appellant argues that the benefit of the doubt doctrine should have applied. *See* App. Br. at 7-8. However, as explained *supra*, the benefit of the doubt doctrine

only applies when after considering all information and lay and medical evidence of record, "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. § 5107(b). Here, there was not "an approximate balance of positive and negative evidence" because there is no positive evidence in support of Appellant's claim. As explained *supra*, the Board properly rejected Appellant's testimony concerning service in Vietnam. Appellant also did not present any other evidence or theory of service connection. Therefore, the benefit of the doubt doctrine does not apply and the Court should reject this argument.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

RICHARD J. HIPOLIT
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Joan E. Moriarty
JOAN E. MORIARTY
Deputy Chief Counsel

/s/ Crystal Liu
CRYSTAL LIU
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027C)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7101

Counsel for the Secretary of
Veterans Affairs