IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-0013

LILLIAN GREEN,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE

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	)	
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ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeal (Board) decision that denied an initial disability rating for bipolar disorder with substance abuse higher than 30% from December 18, 2000, to January 16, 2006, and higher than 50% beginning January 17, 2006, when the Board correctly applied the rating criteria and explained the bases for its decisions.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Lillian Green (Appellant) appeals a November 8, 2018, decision by the Board that denied an initial disability rating for bipolar disorder with substance

abuse higher than 30% from December 18, 2000, to January 16, 2006, and higher than 50% beginning January 17, 2006. (Record (R.) at 4–19). Appellant argues that the Board erred in, or provided an inadequate statement of reasons or bases for, finding the Veteran's reports of symptoms not credible and that the Board otherwise provided an inadequate statement of reasons or bases for denying the increased rating claims over the two periods. She has not shown prejudicial error in the Board's decision. Appellant also argues that the Board erred in not remanding the increased rating claims when it remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU).

C. Statement of Facts and Procedural History

John F. Reed (the Veteran) served honorably in the United States Navy from October 1981 until October 1985. (R. at 1983). He filed a claim for service connection for drug addiction in September 1990. (R. at 6640). The claim was denied in a December 1990 decision. (R. at 6619, 6621–22). He filed a notice of disagreement (NOD) in April 1991. (R. at 6616–17). The Department of Veterans Affairs (VA) regional office (RO) then issued a statement of the case (SOC) continuing the denial. (R. at 6609–13). The Veteran appealed. (R. at 6590–6608).

In August 1991, VA provided Appellant a hearing, after which the hearing officer continued the denial. (R. at 6573–80); (R. at 6581–82). In November 1991, VA issued a supplemental statement of the case (SSOC) continuing the denial of service connection for drug addiction. (R. at 6543–46). In August 1992, the Board of Veterans Appeals (Board) provided the Veteran another hearing. (R. at 6480–

94). In November 1992, the Board remanded the case for further development. (R. at 6473–78). In December 1993, the RO again denied service connection for drug addiction, and it noted that Appellant claimed anxiety secondary to chronic drug usage at the August 1992 Board hearing but then denied that claim. (R. at 6352–54). In January 1994, the RO issued an SSOC continuing the denial of service connection for drug addiction. (R. at 6345–49).

In August 1994, the Board denied the Veteran's claim for service connection for substance abuse disorder. (R. at 6328–35). Appellant appealed, and, in July 1995, the parties filed a joint motion for remand (R. at 6281–84), which the Court granted (R. at 6280). In November 1995, the Board remanded the claim. (R. at 6243–47). In a December 1997 treatment note, the provider documented that Appellant admitted to claiming non-existent symptoms with the intention to exaggerate the severity of his condition. (R. at 1894–95). In October 1999, the RO issued an SSOC continuing the denial. (R. at 5524–28). In April 2000, the Board again remanded the issue of service connection for drug addiction. (R. at 5457–60).

After a hearing in June 2000, a Social Security Administration (SSA) administrative law judge (ALJ) concluded that the Veteran's bipolar disorder was a severe impairment that precluded him from working. (R. at 5283–91). The Board provided the Veteran a hearing in December 2000, during which the Veteran reported that his bipolar disorder rendered him unemployable. (R. at 5340 (5336-59)). That same month, the SSA obtained a functional assessment in connection

with the Veteran's request for SSA disability benefits. (R. at 5421–39). The SSA medical consultant noted that the Veteran's "allegations are not fully credible." (R. at 5435). In January 2001, SSA obtained another medical evaluation report for the Veteran's request for SSA benefits, (R. at 5416-18), and another functional capacity assessment, (R. at 5408–15). In March 2001, the Veteran sought VA treatment for heroin use.[1] (R. at 3557–59); (R. at 3559). In April 2001, the Board remanded the claim for service connection for substance disorder. (R. at 5308–17). In an October 2001 VA mental health treatment record, the Veteran reported feelings of suicide and denied hallucinations. (R. at 3553–55). In November 2001, VA provided the Veteran a mental health evaluation for complaints of manic episodes. (R. at 3550–53). In April 2002, SSA obtained a psychiatric assessment. (R. at 5236-53). In the same month, SSA provided the Veteran a hearing, after which the SSA ALJ found that the Veteran's bipolar disorder was a severe impairment precluding employment. (R. at 5289 (5286–91)). In September 2002, the Veteran sought VA treatment for nightmares. (R. at 3530–33). In January 2003, the Veteran again sought VA mental health treatment. (R. at 3514–16).

In May 2003, the Veteran submitted a statement in support of his claim, noting that he was treated for bipolar disorder since service. (R. at 5184–85). The

[1] In the decision, the Board cited a May 2001 voluntary report for heroin detoxification treatment. (R. at 11–12). It appears, rather, that the Veteran failed to report for the treatment. (R. at 3555–56). This does not appear to have any bearing on the Board's analysis.

Veteran returned for mental treatment at a VA medical center in March 2004, during which the Veteran noted a recent offer of employment. (R. at 3492 (3491–93)). In April 2004, the Veteran reported to a VA facility for heroin detoxification. (R. at 3490-91). In June 2004, the RO issued a rating decision denying service connection for bipolar disorder. (R. at 4986–93). In August 2004, the Veteran also sought VA mental health treatment. (R. at 3430–31). Appellant also received mental health treatment at a VA medical faculty from March 2005 through January 2006. (R. at 3418–21, 3423–29). Meanwhile, from April 2007 to January 2012, Appellant received mental health treatment at a VA medical facility (R. at 3093–3105, 3118–19, 3123–25, 3126–28, 3151–52, 3289–91, 3349–51, 3362–63, 3366–86, 3400–02, 3403–05, 3406–09); and VA neurology consultations in June 2009 and November 2009 (R. at 3371–77).

In a December 2009 decision, the Board granted service connection for bipolar disorder and remanded the issue of service connection for substance abuse disorder. (R. at 4015–34). In February 2010, VA provided the Veteran an examination for his bipolar disorder. (R. at 3998–4005). In January 2011, the Regional Office rated the Veteran's bipolar disorder at 30% from December 18, 2000, and 50% from January 17, 2006. (R. at 3903 (3892–98, 3903–08)). The Board provided the Veteran with a hearing in December 2011. (R. at 3829–45).

The Veteran passed away on January 11, 2012, as a result of heart disease. (R. at 3795). In April 2012, the Board dismissed the claims for increased rating for bipolar disorder and service connection for substance abuse disorder due to the

death of the Veteran. (R. at 3815–20). In December 2012, Appellant requested to be substituted into his appeal as his wife. (R. at 3813). She was found to be properly substituted into the appeal. (R. at 3786–87).

In January 2015, the Board remanded the issue of increased ratings for the Veteran's bipolar disorder. (R. at 3746 (3737–47)). In July 2015, the Board granted service connection for substance abuse disorder and remanded the increased ratings for bipolar disorder. (R. at 3737–47). In September 2015, the RO effectuated the Board's grant of service connection for substance abuse disorder and incorporated the diagnosis into the bipolar disorder disability. (R. at 3729 (3704–05, 3728–33)). In the same month, the RO issued an SOC continuing the denial of an increased rating for bipolar disorder. (R. at 3706–27). Appellant then appealed to the Board. (R. at 3695–99); *see also* (R. at 3691–94).

In the November 2018 decision on appeal, the Board denied an initial disability rating for bipolar disorder with substance abuse higher than 30% from December 18, 2000, to January 16, 2006, and higher than 50% beginning January 17, 2006. (Record (R.) at 4–19). The Board began by noting that the Veteran's statements regarding his symptoms lacked credibility. (R. at 9–11) (citing (R. at 5435) and (R. at 5413)). The Board then cited a history of assessments of the Veteran and relevant treatment notes from December 2000 to January 2004. (R. at 10–14). The Board summarized the evidence as at most closely approximating a 30% rating because of his reported symptoms and his level of occupational and social functioning. (R. at 14–15). The Board next denied

Appellant's increased rating claim, for a rating in excess of 50% for his bipolar disorder for the period from January 17, 2006, until his death in January 2012. (R. at 16–18). The Board began by citing a history of VA examinations and mental health treatment records. (R. at 17). The Board summarized this evidence as showing that the Veteran managed his symptoms effectively with outpatient treatment and medication and remained married through the period. (R. at 17–18). The Board also remanded the issue of entitlement to a TDIU for further development after finding that Appellant's December 2001 lay statement raised the issue of whether his bipolar disorder prevented him from maintaining long-term employment. (R. at 18–19).

This appeal followed.

SUMMARY OF THE ARGUMENT

Appellant argues that the Board erred in—or at least provided an inadequate statement of reasons or bases for—finding the Veteran's reports of symptoms not credible. But the Board properly exercised its role as fact-finder in making this determination. Appellant also argues that the Board otherwise provided an inadequate statement of reasons or bases for denying the increased rating claims over the two periods. For both time periods, however, the Board addressed the relevant symptoms and explained why the associated level of impairment did not warrant a higher rating. Finally, Appellant argues that Board erred in not remanding the increased rating claims when it remanded the issue for entitlement

to a total disability rating based on individual unemployability (TDIU). She has not shown that the issues are so closely related that the Board erred in doing this.

ARGUMENT

A. The Board Properly Assigned a 30% Rating for the Veteran's Bipolar Disorder for the First Period

The Board properly assigned a 30% initial rating for the Veteran's bipolar disorder with substance abuse from December 18, 2000, to January 16, 2006, because the Veteran's symptoms were not of a severity, frequency, and duration and did not produce sufficient occupational and social impairment to warrant a higher rating. The Board considered the relevant evidence from the Veteran's treatment and psychiatric assessments, it explained why it rejected certain of that evidence and how it reached its ultimate conclusion, and that conclusion was not clearly erroneous. The Board should thus affirm this part of the Board's decision.

It is the responsibility and function of the Board to review the evidence and make any and all factual determinations necessary to the disposition of an appeal, including deciding matters of credibility and the weight to be assigned to evidence. Such decisions are reviewed under the deferential clearly erroneous standard and must be affirmed so long as they are supported by a plausible basis in the record. *See* 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990); *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). The Board has wide latitude when it comes to deciding matters of fact and its factual

determinations may be derived from any number of sources, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *See Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 574 (1985). The mere fact that the evidence could be viewed differently does not render the Board's interpretation of the evidence clearly erroneous. *Id.* ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

There are many factors that the Board may consider when deciding the credibility of evidence. The Board may, for example, discredit evidence if it finds that the evidence based upon other, previously discredited or inaccurate information. *See, e.g., Kowalski v. Nicholson*, 19 Vet.App. 171, 179-80 (2005) (holding that the Board may disregard medical opinion if found to be based on discredited history provided by veteran). When evaluating the credibility of lay statements, in particular, the Board may consider whether the statements conflict with and are consistent with other statements or evidence, the potential bias of the witness, *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006), and the level of detail of the information reported, *Gardin v. Shinseki,* 613 F.3d 1374, 1379-80 (Fed. Cir. 2010). And the Board may reject such statements if it finds them to be mistaken, incorrect, untrustworthy, or otherwise unreliable. *See McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006).

A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38

U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Frost v. Shulkin*, 29 Vet.App. 131, 139 (2017). This obligation, however, is not unbounded. The Board need not address every piece of evidence, *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007), nor must it address issues that were neither raised expressly by the claimant nor reasonably raised by the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert*, 1 Vet.App. at 57.

In any case, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc). And to warrant judicial interference with that decision, the appellant must demonstrate that such error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). There is no prejudicial error when a remand for a decision on the merits would serve no useful purpose. *See Lamb v. Peake*, 22 Vet.App. 227, 235 (2008). If the appellant cannot show that the outcome of his claim could have been different but for the alleged error, the error is non-prejudicial. *See Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (noting that error

is nonprejudicial "where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision").

Bipolar disorder is rated under the General Rating Formula for Mental Disorders. 38 C.F.R. § 4.130, diagnostic code (DC) 9432. In deciding the particular evaluation of a mental health disorder under § 4.130, "symptomatology should be the fact-finder's primary focus." *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed. Cir. 2013). Section 4.130 assigns compensable evaluations based on "objectively-observable symptomatology" and "as the ratings increase from 10 to 100 percent, the associated symptoms become noticeably severe." *Id*. at 115. The intermediate compensable disability levels are "distinguished from one another by the frequency, severity, and duration of the associated symptoms." *Id*. Entitlement to an evaluation requires a demonstration that "the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id*. at 117. If the veteran is shown to experience the particular symptoms listed in the diagnostic criteria or symptoms of the same kind, then the inquiry turns to whether and to what degree those symptoms result in the level of social and occupational impairment associated with the rating sought. *Id*. at 118.

Under § 4.130, a 50% rating will be assigned when a veteran demonstrates occupational and social impairment with reduced reliability and productivity due to such symptoms, due to symptoms such as flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term

memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; and difficulty in establishing and maintaining effective work and social relationships. 38 C.F.R. § 4.130.

In the decision on appeal, the Board denied the Veteran's claim for increased rating in excess of 30% for his service-connected bipolar disorder with substance abuse for the period from December 18, 2000, to January 16, 2006. (R. at 9–16). The Board began its analysis by noting that the Veteran's statements regarding the existence or severity, frequency, and duration of his symptoms lacked credibility. (R. at 9). The Board explained that this finding was based on both the Veteran's admission that he had claimed non-existent symptoms in December 1997 to exaggerate the severity of his condition, and the reports of two physicians who examined the Veteran for SSA who determined that his claims about his symptoms and impairment lacked credibility. (R. at 10–11) (citing (R. at 1894–95) and (R. at 5413) (R. at 5435)).

The Board then cited a history of assessments of the Veteran and relevant treatment notes from December 2000 to January 2004. (R. at 10–14). The Board found a December 2000 SSA assessment to be highly probative in its finding that the Veteran was at-most-moderately limited in the 20 explored areas of capacity. (R. at 10) (discussing (R. at 5421–39)). This included the examiner's note that the Veteran's reports about his symptoms and their effects were "not fully credible." (R. at 11). The Board then found that a physician's testimony at an April 2002 SSA

hearing had limited probative value because the physician based his opinion on the Veteran's not-credible reports of suicidal ideation and hallucination, did not perform a physical examination, and did not specify the scope of the evidence he based his testimony on. (R. at 13) (discussing (R. at 5288–89)).

The Board summarized the evidence as most closely approximating a 30% rating based on his reported symptoms (depression, anxiety, chronic sleep impairment, difficulty concentrating, occasional mild memory loss, and infrequent panic attacks controlled by medication) and his level of occupational and social functioning. (R. at 14–15). The Board found his occupational functioning was best captured in the December 2000 SSA assessment and an offer of employment in March 2004. (R. at 15) (discussing (R. at 5421–39); (R. at 3492)). The Board explained his social functioning was demonstrated by a long-term marriage and involvement in multiple rehabilitation support groups. *Id*. Finally, after summarizing the relevant symptoms that the Veteran did not experience, the Board explained that episodes of more severe symptoms did not occur with such severity, frequency, and duration to warrant a 50% rating. (R. at 15–16).

Taken together, the Board's analysis of the matter did not contain error. First, the Board did not clearly err in finding that Appellant showed symptoms generally indicative of a 30% rating and that those symptoms he showed during episodes of worsening did not occur with the severity, frequency, and duration to warrant a higher rating. *See* 38 U.S.C. § 7261(a)(4) (providing for "clear error" review of findings of material fact by the Board). Second, the Board did not clearly

err in finding that the overall level of social and occupational impairment did not meet the level required for a higher rating. Finally, the Board explained adequately the bases for the conclusions, including its finding that the Veteran's own reports were not credible and its rejection of the physician's testimony at the April 2002 SSA hearing. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases to be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review); *Frost*, 29 Vet.App. at 139 (holding that, to provide an adequate statement of reasons or bases, the Board must analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant). As such, the Board did not err, and this Court should affirm denial of a rating greater than 30% for the Veteran's bipolar disorder for the period from December 18, 2000, to January 16, 2006.

B. Appellant's Arguments Do Not Reflect Any Deficiency in the Board's Analysis of the First Period

Appellant's arguments do not reflect any deficiency in the Board's analysis. Speaking generally, the arguments are criticisms of the Board's reasoning that amount to mere disagreements with how the Board weighed the evidence. As such, this Court should reject them.

1. The Board Did Not Err in Finding Appellant Not Credible

The argument that the Board erred in finding Appellant's reports of symptoms not credible is based on a mischaracterization of the Board's analysis and a misunderstanding of the law. Appellant argues that the Board erred in

relying on the Veteran's admission in 1997 that he claimed non-existent symptoms of suicidal ideation and hallucinations because the Veteran continued to report those symptoms as late as 2011 and the Board never addressed these later reports or why a single incident of dishonesty would be relevant across the time. (Appellant's Brief (App. Br.) at 14–16). The problem with this argument is that the Board also relied on reports by two physicians that the Veteran was not a reliable physician, from December 2000 and January 2001. (R. at 9–11). Furthermore, it is entirely appropriate for the Board, in its role as fact finder, to base a negative credibility determination on demonstrated lack of credibility on a material matter. *See Caluza v. Brown*, 7 Vet.App. 498, 511 (1995) ("The credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character."). The two notes by physicians on which the Board relied also related to inability to work and functional restrictions generally. (R. at 10–11); (R. at 5435); (R. at 5413). This shows that the Board did not view the Veteran's lack of credibility as narrowly as Appellant's argument suggests. Essentially, the Board did not find Appellant not credible because of inconsistencies in whether he had suicidal ideation but because the Veteran had demonstrated on multiple occasions to have poor reliability as a witness. In December 1997, not only did the Veteran lie in order to be admitted to the hospital, but the explaining physician noted that he "is an unreliable historian." (R. at 1895). Again, there is no reason the Board should have limited its credibility determinations to a specific statement or issue. *See Caluza*, 7 Vet.App. at 511.

Appellant also argues that the Board should have considered why the Veteran reported symptoms he did not experience in December 1997—to get hospital treatment. (App. Br. at 16–17). Appellant mischaracterizes Appellant's reasons for seeking treatment in December 2007—he did not lie based on a genuine desire to seek medical treatment but played a "big game" and lied to be admitted to appease his wife so he would be let back into the house. (R. at 1894). Further, when the basis for the rating sought is the existence of particular symptoms, *see* 38 C.F.R. § 4.130, the relevant concern is whether the symptom in question exists at all. *See Vazquez Claudio,* 713 F.3d at 118 ("symptomatology should be the fact-finder's primary focus."). The reason for mis-reporting is simply irrelevant. The Board was not required to address it.

2. The Board Considered the 2002 SSA Assessment

The argument that the Board erred in failing to address a favorable, 2002 SSA assessment is incorrect because the Board did adequately address the evidence. Appellant argues that the Board failed to address that 2002 SSA assessment, where the examiner noted that Appellant experienced marked difficulties in maintaining social function and maintaining concentration, persistence, or pace. (App. Br. at 17–18) discussing (R. at 5250). Appellant asserts that this evidence suggested difficulty maintaining effective work and social relationships and impairment in short-term memory. (App. Br. at 18). The Board noted the evidence. (R. at 13). That report was only one piece of a series that included many assessments, including a December 2000 assessment that found

at most moderate limitation of memory, a May 2001 treatment note that recorded "fair memory," an October 2001 VA examination that found intact memory. (R. at 10–14). The Board ultimately concluded that, based on the preceding evidence, the Veteran was found by medical examiners to have "occasional mild memory loss" and to be "cooperative and friendly with peers and staff." (R. at 14–15). This discussion identified the evidence that supported the overall assessment of the Veteran's memory and ability to maintain relationships, including the consistent medical assessments on the issue, so it was adequate. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases to be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review); *see also Newhouse*, 497 F.3d at 1302 (recognizing that the Board need not comment on every piece of evidence contained in the record).

3. The Board Did Not Err by Relying on Absent Symptoms

The argument that the Board erred in relying on symptoms that the Veteran did not have is also based on a mischaracterization of the record and a misstatement of the law. Appellant argues that the Board erred by relying on the symptoms did not have, at least for not explaining why it cited that absence, and cites to *Vazquez-Claudio* and *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). (App. Br. at 18–19). The Board did note the absence of certain symptoms that might warrant a higher rating. (R. at 15–16). But neither *Vazquez-Claudio* nor *Mauerhan* stands for the proposition that the Board may not at least identify potential symptoms that are, in fact, not present. Further, the Board did not rely

on the absence of symptoms but, rather, identified both those symptoms found and not found and continued to discuss the level of impairment experienced as a result of the symptomology present. (R. at 14–17). Finally, the reason that the Board cited this material is apparent, given the analysis it was required to perform. *See Vazquez Claudio,* 713 F.3d at 118 ("[S]ymptomatology should be the fact-finder's primary focus.").

4. The Board Addressed Relevant Evidence About Symptoms

Appellant argues, first, that the Board failed to address evidence that the Veteran experienced disturbances of mood, judgment, and motivation, and impaired judgment. The Board found that these "50% symptom" did exist to some extent, in connection with his drug use, but that the severity, frequency, and duration of the symptoms did not result in a sufficiently severe overall disability picture. (R. at 15–16). Appellant points to evidence of impaired judgment, in the form of verbal abusiveness when the Veteran did not receive the desired prescription (R. at 3559) and reports that he drove and worked while high and would stop taking lithium when depressed to have a manic episode (R. at 3578–79 (3578–82)). App. Br. at 20–21. Regarding the former, it was a single incident and so aptly captured by the Board's characterization of the impaired judgment as an insufficiently-frequent episode. (R. at 16). Regarding the latter, the note is from February 2000, before the period on appeal. (R. at 3578–79). There is also no indication that the issue continued. The Board did not clearly err in its assessment of the Veteran's impaired impulse control.

Appellant also argues that the Board improperly relied on its own medical judgment to "dismiss" the more serious episodes because they occurred when the Veteran was using drugs, App. Br. at 21–22, but this is not what the Board did. The Board only noted that these episodes tended to be in connection with his drug use and did not conclude that they were less severe, frequent, or shorter because of that connection or rely on that observation in any other faction. (R. at 16). Neither did the Board make any judgment that drug use rather than bipolar disorder caused these symptoms. *Id*. So, there was no medical judgment.

Similarly, Appellant points to evidence of "long-lasting difficulties" with motivation and mood, App. Br. at 22–23, but this evidence does not indicate that the Board's characterization of these symptoms was wrong. The Board found some impaired judgment and disturbances in motivation and mood, but not with the severity, frequency, and duration to result in a disability picture consistent with a 50% rating. (R. at 16). Appellant points to evidence of issues with motivation and mood (R. at 3473 (3472–74), 3577, 3586, 5007 (5006–07), 5255 (5255–56)). The brief does not explain why these notes shows that the Board erred. *Hilkert*, 12 Vet.App. at 151 (imposing on the appellant the burden of demonstrating error). Appellant also points to evidence of mood swings and irritability (R. at 3553), and the outburst of anger when the Veteran did not receive his desired prescription (R. at 3559), but other than the bald assertion that these were not isolated episodes and were severe, Appellant has not explained why the Board erred.

Appellant's brief argues that Appellant's symptoms in this vein aggravated his drug-related symptoms because they prevented him from successfully pursuing treatment. App. Br. at 22–23. But the notes cited, where the Veteran was not motivated to maintain abstinence (R. at 3577–78) and where the Veteran was not remorseful for non-compliance in treatment, (R. at 3578), do not indicate any disturbance of mood or motivation. Nothing in the substance of these notes indicates anything other than documented difficulties with drug treatment, not "disturbances of motivation or mood." So the Board did not have to address them in its discussion of the matter of whether mood or motivation disturbances exist. *Frost*, 29 Vet.App. at 139 (requiring the Board to explain why it rejected evidence materially favorable to the claimant.).

Finally, Appellant argues that the Board erred in finding that Appellant did not experience difficulty establishing and maintaining effective work and social relationships. App. Br. at 23 (discussing (R. at 15–16)). Appellant points to what the brief characterizes as difficulty with relationships. App. Br. at 23 (citing (R. at 3473), (R. at 3554), (R. at 3579), and (R. at 5250)). Yet the brief does not explain why the evidence of limited ability communicating showed difficulty with relationships. (R. at 3473). The report that he was unemployed due to his depression, such that this unemployment caused marital discord (R. at 3554), is addressed by the Board's discussion directly of the allegation that he was unable to work because of his disability. (R. at 15). The stress he experienced stemming from his pursuit of an affair (R. at 3579) and the threat by Appellant to kick the

Veteran out of the house unless he received care for his addiction (R. at 3046) do not indicate on their face difficulty maintaining an effective relationship. Neither does the Veteran's noted inappropriate affect when discussing pain he caused Appellant during their marriage. (R. at 3581). So the Board was not required to address it. *Frost*, 29 Vet.App. at 139 (requiring the Board to explain why it rejected evidence materially favorable to the claimant.). Finally, Appellant cites the notation of marked difficulties in maintaining social functioning from the April 2002 SSA assesment, (R. at 5250), which allegation of error was discussed above. The Board did not err in failing to discuss these specific medical records.

Overall, the Board neither clearly erred in its characterization of the symptoms nor failed to address any relevant evidence. Generally, the evidence cited by Appellant was either not relevant, or the Board's discussion of the matter at issue adequately explained why the evidence did not result in a higher rating. For these reasons, the Court should affirm the Board decision.

C. Appellant's Arguments Do Not Reflect Any Deficiency in the Board's Analysis of the Second Period

Similarly, the Board properly assigned a 50% rating for the Veteran's bipolar disorder for the period beginning January 17, 2006, and lasting until his death in January 2012 because his symptoms were not of a frequency, severity and duration, and his was not sufficiently impaired by them, to warrant a higher rating. The Board considered the relevant evidence from the Veteran's treatment and psychiatric assessments, and it explained why it rejected certain that evidence and

how it reached its ultimate conclusion. The Board should thus affirm this part of the Board's decision.

In this part of the decision on appeal, the Board denied Appellant's increased rating claim, for a rating in excess of 50% for his bipolar disorder for the period from January 17, 2006, until his death in January 2012. (R. at 16–18). The Board began by citing the history of VA examinations and mental health treatment records, particularly a February 2010 VA examination, reports of sobriety and compliance with medication in January and June 2006 treatment notes, and notations of depressive moods with tension and irritability in VA mental health treatment records from April 2007 to January 2012. (R. at 17). The Board summarized this evidence as showing that the Veteran managed his symptoms effectively with outpatient treatment and medication, and that he remained married through the period. (R. at 17–18). The Board noted that Appellant did not exhibit several of the symptoms associated with a 70% rating under § 4.130, or others of similar severity, frequency, and duration. (R. at 18).

Taken together, the Board's analysis of the matter did not contain error. The Board did not clearly err in finding that Appellant did not show that the frequency, severity, and duration of his symptoms, or that their effects on his occupational and social function did not warrant a higher rating. The Board also explained adequately the bases for the conclusions. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases to be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review); *Frost*, 29

Vet.App. at 139 (holding that the Board must analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant). As such, the Board did not err, and this Court should affirm that part of the decision.

1. The Board Did Not Err by Relying on Absent Symptoms

As with the previous section, the argument that the Board erred in relying on symptoms that the Veteran did not have, App. Br. at 25–26, is based on a mischaracterization of the record and a misstatement of the law. The Board did note the absence of certain symptoms that might warrant a higher rating. (R. at 18). As discussed, the law does not bar the Board's identifying symptoms that are, in fact, not present, *see* Section A.3 *above*, and the Board did not rely on the absence of symptoms, but rather addressed the symptoms and level of impairment experienced, (R. at 16–18). This Court should reject the argument.

2. The Board Adequately Addressed Evidence of Near Continuous Depression and inability to Establish and Maintain Effective Relationships

Appellant argues that the Board failed to address evidence that the Veteran experienced near-continuous depression and an inability to establish and maintain effective relationships. App. Br. at 26–29. The Board found that these "70% symptoms" did not exist. (R. at 18). On this front, Appellant points to evidence of the Veteran's severe depression through the appeal period. (R. at 3366), (R. at 3400), (R. at 3842), (R. at 4086 (4086–89)). Two of these citations only document reports of depression, not that it is "near-continuous" and "affecting the ability to function independently, appropriately, and effectively," as is required by § 4.130.

(R. at 3366) and (R. 3400). One is a letter that does not relate to the matter at hand. (R. at 4086). The last citation is the Board hearing, at which the Veteran alleged the particular symptoms from § 4.130, as well as a total inability to work. (R. at 3842–43). While the Board did not address this allegation, it explained that it did not find the Veteran to be a credible concerning the severity of his symptoms. (R. at 10–11). In short, none of these pieces of evidence reflects any Board error.

Appellant also levels two criticisms against the Board's discussion of the Veteran's ability to establish or maintain effective relationships. App. Br. at 27-29. First, the mere fact that the Veteran maintained a relationship does not mean that he maintained an effective relationship. Appellant's brief points to evidence that the Veteran had difficulties with his relationship and that he hardly spoke with his family. (R. at 3842). The Board's characterization of the marriage rests on its duration and the fact that they were able to vacation together. (R. at 17–18). These are intelligible and reasonable bases to draw a conclusion about the nature of the marriage. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases to be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review).

Appellant's argument, on the other hand, is in part a disagreement with the conclusion drawn from the evidence, not a proper basis for clear error for review. *See Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). It is also, in part, a charge that the Board had to address the evidence that he "hardly

spoke with his family." The Board, however, is not required to address every piece of evidence. *See Newhouse*, 497 F.3d at 1302. Further, Appellant has not shown how the challenges the Veteran faced in his marriage meant that it was not an effective relationship, given its longevity. *See Hilkert*, 12 Vet.App. at 151.

Second, Appellant points out that the Board discussed the Veteran's ability to maintain an effective relationship but not to establish new one. The relevant symptom, however, is "inability to establish *and* maintain effective work and social relationships." 38 C.F.R. § 4.130. (emphasis added). The requirement is conjunctive, not disjunctive, requiring inability both to establish and maintain relationships. Appellant does not cite any authority that the criterion is disjunctive such that either inability would suffice, and that interpretation is contrary to the plain meaning. Because Appellant has not shown error in how the Board assessed the Veteran's ability to establish and maintain an effective relationship, this Court should reject the argument and affirm this part of the Board's decision.

D. The Increased Ratings Are Not Inextricably Intertwined With the TDIU

Finally, the Board did not err by remanding the issue of entitlement to a TDIU for further development while deciding the claim for an increased rating for the bipolar disorder. Appellant points to no evidence that the development will bring forward, instead relying on speculation and the mere possibility that new evidence may be found. She has not shown that the matters are so intertwined that it was error for the Board to decide the increased rating claim.

Total disability ratings for compensation may be assigned when a disabled veteran is unable to secure or follow a substantially gainful occupation, under certain circumstances. 38 C.F.R. § 4.16(a). A veteran is "unemployable" if he or she is "unable to secure or follow a substantially gainful occupation." 38 C.F.R. § 4.16; *see also Kellar v. Brown*, 6 Vet.App. 157, 162 (1994).

Where the facts underlying separate claims are "intimately connected," interests of judicial economy and avoidance of piecemeal litigation require that the claims be adjudicated together. *Smith v. Gober*, 236 F.3d 1370, 1373 (Fed. Cir. 2001). Where a decision on one issue would have a "significant impact" upon another, which in turn 'could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources," the claims are inextricably intertwined. *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). In that case, the Court had been asked to review a claim for the increased rating of an anxiety condition that the veteran and Board both agreed was due to a heart condition, for which the veteran had a to-date denied claim for service connection. *Id*. at 181. The Court declined to exercise jurisdiction over the anxiety condition while the service connection claim for the heart condition was still pending. *Id*. at 183. Finally, the issue of TDIU is not necessarily intertwined with an increased rating claim and may be "subsequent, separate, and distinct." *Vettese v. Brown*, 7 Vet. App. 31, 34 (1994). As the question of whether two claims are inextricably intertwined depends on the degree of connection between the two claims, it is a question of fact, and this Court should review it for clear error. *See* 38 U.S.C.

§ 7261(a)(4) (providing that factual determinations made by the Board are entitled to deference and reviewed only for clear error).

The Veteran had service-connected bipolar disorder, residuals of injury to a left should injury, post-operative residuals of septoplasty and cervical strain. *See* (R. at 3730 (3730–71)). According to the Board, his statements in a December 2001 statement raised the issue of whether his bipolar disorder prevented him from maintaining long-term employment. (R. at 18). The Board remanded the issue of entitlement to a TDIU for further development. (R. at 18–19). Specifically, the Board ordered VA to send Appellant notice and instructions on completing an application for TDIU, the VA Form 8940; to conduct any other necessary development, such as verifying prior employment; and to obtain an opinion from an examiner "as to the functional effects of the service-connected disabilities alone on his ability to obtain or maintain substantially gainful employment, with a full supporting rationale." (R. at 19).

The increased rating and TDIU issues are not inextricably intertwined because nothing in the remand suggests that the Board lacked information about the impact of the bipolar disorder on his employability. The Board wanted a VA Form 8940, an employment history, and an expert opinion on the impact of all service-connected disabilities on his employability. (R. at 19). Appellant has not shown how the apparent lack of a work history impacted the Board's analysis of the increased rating claim. As far as the expert opinion, there were three assessments of the impact of his bipolar disorder on his ability to work, the last in

2010. *See* (R. at 5421–38); (R. at 5236–5252); (R. at 3998–4005). The Board found these assessments to be adequate and address the evidence of employment impact in its analysis of the increased ratings claim. (R. at 9–18). Finally, the issue of TDIU will encompass the effects of all of his service-connected disorders, not just his psychiatric conditions, and the Veteran had many service-connected disabilities. *See* 38 C.F.R. § 4.16; *see also* (R. at 3730–31). There is no basis to conclude that the Board needed more information on this point.

Appellant's arguments point to the overlap in subject matter between the increased ratings claim and the issue of TDIU, but they do not provide any grounds to believe that the development of the issue of TDIU will produce evidence in whose absence it was error for the Board to proceed on the increased rating claim. As Appellant argues, establishing entitlement to a 50%, 70%, or 100% rating will involve inquiries into the level of occupational impairment, as will the issue of a TDIU. *Compare* 38 C.F.R. § 4.130, *with* 38 C.F.R. § 4.16(a). But Appellant does not explain why the mere possibility of new, relevant evidence shows that the Board erred in proceeding to decide the case. For one thing, § 4.130 only require consideration of occupational impairment, which the opinions of record already address, whereas § 4.16 explicitly requires the adjudicator to consider a veteran's employment history. Further, any additional evidence on occupational impairment would still not affect the Board's analysis of his social impairment, and the rating schedule requires both for a higher rating. *See* 38 C.F.R. § 4.130. There is nothing here like the "significant impact" found in *Harris*. *See Harris*, 1 Vet.App. 180

(finding claims "inextricably intertwined" when there is a "significant impact" of one on the other, as when one condition caused another).

Appellant also cites *Brambley v. Principi*, 17 Vet.App. 20 (2003), to support the argument that the TDIU development will produce relevant to the increased rating claim, but review of that case shows why remand is not appropriate here. The case stands generally for the proposition that an increased rating case might be inextricably intertwined with an issue of TDIU such that it was premature to remand the latter and deny the former. *Brambley*, 17 Vet.App. at 24. But in that case, the Board had remanded the TDIU issue while denying an extra-schedular increased rating for all of the veteran's service-connected disabilities. *Id.* at 22–24. At that time, an extraschedular analysis required consideration of the combined effects of the service-connected disabilities on occupational impairment, such that the occupational impairment the veteran experienced due to service-connected conditions by definition was due to the very same conditions for which the Board had denied an extra-schedular rating. In the case at hand, where the Board's remand ordered an employment history and a medical opinion on the employment impact of all the Veteran's service-connected, most of which were not before the Board, that inference does stand. Thus Appellant still has to explain why the Board's lack of this information made its decision of the increased rating claim clearly erroneous, especially in light of the evidence already collected about the impact of the Veteran's bipolar disorder on his ability to work. *See Hilkert*, 12 Vet.App. at 151 (imposing on the appellant the burden of demonstrating error).

Appellant has not shown clear error, and he, instead, relies on mere possibility and speculation. The Court should reject this argument.

Finally, any failure by the Board's to address the matter did not leave its statement of reasons or bases inadequate. Because Appellant cannot point to any grounds to conclude that the TDIU and increased ratings claims are inextricably intertwined, the issue was not reasonably raised by the record. The Board was not required to address it, *see Robinson*, 21 Vet.App. at 552-56 (requiring the Board to address issues raised by the claimant or the record), and the failure to address it did not prejudice Appellant, *see Lamb*, 22 Vet.App.at 235 (holding that there is no prejudicial error when a remand would serve no useful purpose). Again, the Court should reject this argument and affirm the Board's decision.

E. Appellant Has Abandoned All Issues Not Argued in His Brief

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

CONCLUSION

Appellant has not demonstrated prejudicial error in the Board's denial of an initial disability rating for bipolar disorder with substance abuse higher than 30% from December 18, 2000, to January 16, 2006, and higher than 50% beginning January 17, 2006. The Court should affirm the Board's decision.

Respectfully submitted,

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