Vet.App. No. 19-0287

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

PATRICK RODRIGUEZ,
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

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

SARAH W. FUSINA
Deputy Chief Counsel

MARGARET E. SORRENTI
Appellate Attorney
Office of the General Counsel (027H)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6790

Attorneys for Appellee

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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-0287
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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. ISSUES PRESENTED

1. Whether the Court should affirm the Board of Veterans' Appeals' (Board) December 17, 2018, decision that denied entitlement to service connection for a right shoulder disability.

2. Whether the Court should affirm the Board's December 17, 2018, decision that denied a rating in excess of 30% disabling for service-connected headaches.

3. Whether the Court should affirm the Board's December 17, 2018, decision that denied a rating in excess of 30% disabling for service-connected posttraumatic stress disorder (PTSD) also claimed as anxiety and depression.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a) to consider the Board's decision.

B. Nature of the Case

Appellant, Patrick Rodriguez, appeals the Board's December 17, 2018, decision that denied his claims of entitlement to service connection for a right shoulder disability, a rating in excess of 30% disabling for service-connected headaches, and a rating in excess of 30% disabling for service-connected PTSD, also claimed as anxiety and depression. [Record (R.) at 1-20].

C. Statement of Relevant Facts

Appellant served on active duty from August 2002 to August 2008. [R. at 1210].

In May 2017, Appellant filed an "Intent to File a Claim for Compensation." [R. at 1227-28]. That same month, VA informed Appellant that if it received his completed application within one year from the date that the intent to file was received and VA decides that he is entitled to benefits, the effective date would be the date that VA received the intent to file. [R. at 1220 (1220-23)].

Appellant underwent a cervical spine x-ray in May 2017 because he reported neck pain and radiculopathy to the bilateral shoulders. [R. at 99-100]. The x-ray impression was completely normal. *Id*. In another May 2017 treatment note, Appellant reported experiencing a right shoulder electric shock sensation

associated with his right foot. [R. at 121 (121-24)]. In September 2017, Appellant filed claims of entitlement to service connection for headaches, PTSD, and a right shoulder condition. [R. at 1212 (1211-19)].

In an October 2017 VA examination, Appellant reported that he got three to four headaches per day and that the headaches began about four years prior. [R. at 457 (457-59)]. Appellant described intense, throbbing pain usually around his right eye and that he would take over the counter medication for the pain. *Id*. He reported that his concentration and focus were affected at work and that sunlight exacerbated his headaches, so he had to wear sunglasses. *Id*. Upon examination and after a review of the record, the examiner found that Appellant experienced pulsating or throbbing pain, localized to one side and sensitivity to light. [R. at 458]. The examiner further noted that Appellant's pain lasted for less than one day and was typically on his right side. *Id*. The examiner also found that while Appellant suffered from prostrating attacks, such occurred only once a month and were not productive of severe economic inadaptability. *Id*.

In an October 2017 mental health examination, the examiner diagnosed Appellant with PTSD and major depressive disorder per the DSM-V criteria. [R. at 829 (824-33)]. The examiner found that Appellant's symptoms caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, selfcare and conversation. [R. at 826]. The examiner noted that Appellant experienced

depressed mood, anxiety, panic attack more than once a week, and chronic sleep impairment. [R. at 831]. The examiner further noted that Appellant's behavior, speech and thought processes were all within normal limits and Appellant was oriented to time, people and place. [R. at 832]. Appellant denied any suicidal or homicidal ideations but reported depression, loss of interest, feelings of worthlessness, fatigue, and insomnia. *Id*. The examiner also noted that Appellant experienced passive thoughts of death but no serious suicidal ideation, intent or plan. *Id*.

An October 2017 treatment note reflects that Appellant reported experiencing "regression" in mood and increased sleep problems. [R. at 544 (543-46)]. Upon examination, the examiner noted that Appellant had adequate hygiene and grooming, was cooperative, had no evidence of psychomotor agitation or retardation, and his mood was anxious, his affect was full in range and congruent with mood, his speech was within normal limits, his thought process was logical and goal oriented, alert, his insight was fair, and his attention and concentration was within normal limits. [R. at 544-45]. The examiner found that Appellant had persistent, uncontrollable worry that was consistent with general anxiety disorder. [R. at 545].

In a November 2017 Rating Decision, the Regional Office (RO) granted Appellant's claim of entitlement to service connection for PTSD and assigned a 30% disability rating, and denied his claim of entitlement to service connection for a cervical spine condition and a right shoulder condition. [R. at 547-56]. In a

December 2017 Rating Decision, the RO granted Appellant's claim of entitlement to service connection for headaches and assigned a 30% disability evaluation. [R. at 405-420]. Appellant appealed in January 2018. [R. at 392-93]. In February 2018, VA notified Appellant of the opportunity to opt-in to a new claims and appeals process, Rapid Appeals Modernization Program ("RAMP"),[1] and provided Appellant information as to what it would mean if he chose to participate in the program. [R. at 334-37].

In a January 2018 VA examination for chronic fatigue syndrome, Appellant reported that he experienced three headaches a day. [R. at 341 (340-43)]. In a May 2018 vocational assessment, Appellant reported feelings of worthlessness and that he was withdrawn and did not have any friends. [R. at 280 (274-89)].

On May 30, 2018, Appellant, through his representative[2], opted into RAMP, and elected to have all eligible issues that were currently on appeal reviewed in the higher-level review process. [R. at 271-72]. Appellant indicated that he understood the review would be based upon the evidence submitted as of the date of the election and that VA would not seek additional evidence on his behalf. [R. at 272]. In September 2018, Appellant, through his representative, also certified

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[1]On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55 (to be codified as amended in scattered sections of 38 U.S.C.), 131 Stat. 1105 (2017), also known as the Appeals Modernization Act (AMA).

[2] The same representative, Julie L. Glover, appears on Appellant's behalf in the instant case. The record shows that Ms. Glover has been representing Appellant since January 2018, prior to the filing of his January notice of disagreement. [R. at 394].

his understanding that VA would conduct an informal conference during the higher-level review process, but that it would not accept submission or evidence or introduction of facts not present prior to the election for higher-level review; Appellant further certified his understanding that he could file a supplemental claim after VA issues notice of the decision if he had additional evidence he would like to submit for review. [R. at 80 (80-83)]. In a September 2018 RAMP Rating Decision, the RO considered the evidence of record as of the date that VA received the RAMP election form, May 30, 2018. [R. at 70-76]. Within the decision, the RO noted that VA had received additional evidence after Appellant's opt-in to the RAMP program and that the evidence was not considered as part of this decision. [R. at 70]. The RO also notified Appellant that if he would like VA to reconsider any of the issues addressed in this decision and take the additional evidence into consideration, he could submit a supplemental claim and that effective date protections would apply if that supplemental claim was received within one year of the date of notice of the decision. *Id*. Following, the RO denied Appellant's claims of entitlement to service connection for a right shoulder condition and to increased disability ratings for PTSD and headaches. [R. at 70-76].

Appellant did not submit a supplemental claim. Instead, Appellant timely appealed and opted for direct review by the Board (based on the evidence of record at the time of the prior decision). [R. at 44-45]. Along with his appeal, Appellant submitted a brief. [R. at 21-34]. The Board issued the decision on appeal in December 2018. [R. at 1-18].

III. SUMMARY OF THE ARGUMENT

The Board provided adequate reasons or bases for its finding that Appellant was not entitled to service connection for a right shoulder condition as there was no evidence prior to his May 30, 2018, opt-in to the RAMP program that reflected that his right shoulder condition was related to service. Therefore, the Court should affirm the Board's denial of entitlement to service connection for a right shoulder condition.

As the evidence also fails to reflect that the Board clearly erred in finding that Appellant's headaches were not capable of producing severe economic inadaptability to warrant an increased rating for headaches, the Court should affirm the Board's finding that Appellant was not entitled to a 50% disability rating for headaches. Finally, the Board had a plausible basis for finding that Appellant was not entitled to an increased rating for PTSD and that finding should not be disturbed as it is not clearly erroneous.

IV. ARGUMENT

A. The Board's Finding That Appellant Was Not Entitled to Service Connection for a Right Shoulder Condition Should Be Affirmed.

The Secretary first notes that Appellant only argues that the Board erred in its analysis as to whether he is entitled to service connection on a secondary basis. Appellant's Brief (App. Br.) at 10-13. Thus, the Court should find that he has abandoned any argument as to the Board's finding that he was not entitled to service connection on a direct basis. [R. at 8-9]; *see Pederson v. McDonald,* 27

Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief."); *see also Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief.").

Turning to the argument Appellant presents on appeal as to his right shoulder condition being secondary to his cervical spine condition, App. Br. at 10-13; [R. at 29], while the Board did not consider this theory of entitlement, Appellant has failed to meet his burden of showing any prejudicial error. *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). As stated, Appellant opted into the RAMP program on May 30, 2018, at which point the record closed. [R. at 271-72]; 38 U.S.C. § 7113. On numerous occasions, Appellant, through his representative, certified his understanding that VA would not seek or consider additional evidence submitted after May 30, 2018. [R. at 44-45, 80, 272].

While Appellant was given the option to file a supplemental claim following the RO's RAMP rating decision, he instead opted for direct review by the Board, and the Board's decision was consequently limited to review of the evidence of record at the time of Appellant's opt-in to the RAMP program. [R. at 44-45]; 38 C.F.R. § 20.301. In opting for direct review, Appellant and his representative knew

that the Board's decision would be limited to the evidence of record at the time of the prior decision as he specifically chose that option. [R. at 44-45].

As a result of these facts and Appellant's knowledge that the Board would not consider evidence submitted after May 30, 2018, Appellant fails to show that he was harmed by the Board not addressing secondary service connection. This is because he was not service connected for a cervical spine condition prior to May 30, 2018, and Appellant does not argue or demonstrate otherwise. *See* App. Br. at 10-13; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curium*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also* 38 C.F.R. § 3.310; *Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc) (recognizing that secondary service connection can only be granted if the disability is proximately due to or the result of a service-connected disease or injury or aggravated by a service-connected disease or injury).

As there could be no basis for a finding of service connection under the theory that Appellant's right shoulder condition was secondary to his non-service-connected cervical spine condition, there is no remandable error. *Sanders*, 556 U.S. at 409. If the appellant cannot demonstrate that the outcome of his claim could have been different had the alleged error not been committed, the error is necessarily non-prejudicial. *See Valiao v. Princip*i, 17 Vet.App. 229, 232 (2003) (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").

Therefore, any failure to address a theory of secondary service connection that was not supported or raised by the record at the time of the RAMP higher-level review opt-in is not error warranting remand.

To the extent Appellant relies on a nonpublished opinion in which the Court found remand warranted for Appellant's claim of entitlement to service connection for erectile dysfunction on the basis that the Board did not consider and adjudicate an argument reasonably raised by the record – specifically whether the veteran's erectile dysfunction was related to his service-connected PTSD – Appellant acknowledges that this case is unpublished and nonprecedential and, thus, the Court would not be bound by it. App. Br. at 11, citing *Thomas v. McDonald*, No. 14-4664, 2015 U.S. App. Vet. Claims LEXIS 474 (Apr. 20, 2015); *see* U.S. VET. APP. R. 30(a). Additionally, this case is distinct from Appellant's case as the theory of secondary service connection in *Thomas* was based on a condition that was already service-connected whereas in stark contrast, Appellant's argument is that he may be entitled to service connection because his non-service-connected right shoulder condition was potentially related to his then non-service-connected cervical spine condition. App. Br. at 10-13. As discussed, this argument is far too attenuated and fails to demonstrate harm. *Woehlaert*, 21 Vet.App. at 463; *see Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), *rev'd on other grounds*, 444 F.3d 1328 (2006); *Hilkert*, 12 Vet.App. at 151; *Berger v.*

Brown, 10 Vet.App. 166, 169 (1997) (recognizing that "the appellant . . . always bears the burden of persuasion on appeals to this Court").

Appellant, within his recitation of the facts, also references a prior statement that his right shoulder condition was inextricably intertwined with his cervical spine condition, which was previously deferred. App. Br. at 2; *see* [R. at 29, 69]. However, he fails to point to any evidence that reflects that these conditions are related, much less that they are inextricably intertwined such that a decision on one issue would have a "significant impact" on another. *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991). Instead, Appellant points to evidence that reflects complaints of both right shoulder and neck pain, but do not – as he appears to suggest – indicate they are related. App. Br. at 11-12, citing [R. at 99 (May 2017 treatment note reflecting normal x-rays of the neck and shoulders), 176-77 (August 2017 treatment note reflecting complaints of "continued posterior neck pain and right should pain")].[3] As there was no evidence that reflected that Appellant's right shoulder condition was even related to his non-service-connected cervical neck condition, the Board did not err in declining to discuss whether the two issues were inextricably intertwined.

Appellant next argues that he was entitled to an examination for an opinion as to whether his right shoulder condition was related to his non-service-connected

[3] The Secretary notes that Appellant misrepresents this treatment note as he states that it reflects "neck pain with associated right shoulder pain." App. Br. at 11. A plain reading of the treatment contradicts Appellant's characterization as the note only reflects concurrent complaints of neck and right shoulder pain. [R. at 177].

cervical spine condition. App. Br. at 12-13. As discussed, there could be no basis for relief on this theory of entitlement as his cervical spine condition was not service-connected, and thus, there could be no duty to assist in obtaining an examination based on that theory. Additionally, Appellant fails to recognize that, in cases where a veteran has opted into the RAMP program, VA's duty to assist is limited to the initial period after receipt of a substantially complete initial or supplemental claim until VA issues a decision. *See* 38 C.F.R. § 3.151(d); 38 C.F.R. § 3.159(c). In this case, Appellant, through his representative, selected the higher-review lane and then the direct appeal to the Board option, and indicated his understanding on numerous occasions that this meant VA would not assist him in developing additional evidence and that VA would not consider additional evidence. [R. at 44-45, 80, 272]. Accordingly, Appellant's argument regarding VA's duty to assist at the Board level is without merit. Thus, the Court should affirm the Board's denial of entitlement to service connection for a right shoulder condition.

B. The Board Complied with *Pierce v. Principi*, 18 Vet. App. 440 (2004), and Provided Adequate Reasons or Bases For Its Finding That Appellant Was Not Entitled to an Increased Rating for Headaches.

As Appellant fails to point to any evidence that his headaches were capable of producing severe economic inadaptability, he fails to meet his burden of persuasion on appeal. *See* App. Br. at 13-16; *Hilkert*, 12 Vet.App. at 151. In fact, Appellant cites to no evidence within his analysis. App. Br. at 13-16. Instead, his argument relies wholly on whether the Board complied with the Court's holding in

Pierce. *See id*.; 18 Vet.App. 440. As discussed fully below, the Board's decision is sound and should be affirmed by the Court.

As Appellant notes, in *Pierce*, the Court held that the Board erred when it refused to award a 50% disability rating for a headache disorder without discussing the "interplay" among the following regulatory concepts: reasonable doubt being resolved in favor of a claimant; a higher possible evaluation applying if a disability picture more nearly approximates the criteria for that rating; and all the elements specified in a disability grade need not necessarily be found. *See* 18 Vet.App. at 445; 38 C.F.R. §§ 4.3. 4.7, 4.21. Appellant asserts that a lack of such discussion is, per se, prejudicial. App. Br. at 16. Contrary to Appellant's assertion, by statute, the Court is required to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409. Appellant has not cited to any evidence that demonstrates reasonable doubt that must be resolved in his favor, that his symptomatology more nearly approximates the higher rating criteria, or that his disability picture meets elements specified in any other disability grade. *See* 38 C.F.R. §§ 4.3. 4.7, 4.21, *Pierce*, 18 Vet.App. at 445. Thus, Appellant does not explain why the Board was required to discuss the "interplay of regulations" that clearly do not affect his case, or how the Board's failure to do so constitute prejudicial error. *Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 409.

Appellant also argues that the Board errs in its analysis of whether Appellant's headaches are prolonged attacks productive of severe economic inadaptability such as to warrant an increased rating. App. Br. at 13-16; 38 C.F.R.

§ 4.124a, Diagnostic Code (DC) 8100; *Pierce*, 18 Vet.App. at 445-46. Again, Appellant fails to point to any evidence indicative of an increased rating. *See* App. Br. at 13-16. Instead, he merely disagrees with the Board's notation that, in addition to the records only reflecting that he had three to four headaches per day and one incapacitating episode per month, he also ("[m]oreover") continued to be employed. [[R. at 11]; *Pierce*, 18 Vet.App. at 446. Contrary to Appellant's assertion, the Board does not err in referencing employment, especially when, as here, the Board's finding was clearly based on the lack of evidence that Appellant's headaches were capable of producing "severe" economic inadaptability and Appellant fails to point to any evidence at all, much less any evidence to contradict this finding. [R. at 11]; *Pierce*, 18 Vet.App. at 446. Thus, the Board's discussion of the totality of the evidence to come to its decision that Appellant's migraines were not capable of producing severe economic inadaptability was plausible and supported by an adequate statement of reasons or bases. [R. at 11 (noting that while Appellant reported his headaches impacted his work, he remained employed for the entire period on appeal and he only had one headache of an incapacitating nature once per month)].

Appellant again relies on a nonprecedential opinion for his argument. App. Br. at 15-16. But, as Appellant notes, that case is both not precedential and factually different from this case as the Board in the decision on appeal did not base its finding on whether Appellant was unemployable and in *Penn-Haynes*, there was (arguably) evidence to support that the claimant's headaches were

capable of producing severe economic inadaptability. *See* App. Br. at 15-16; *Penn-Haynes v. Wilkie*, No. 16-5053, 2019 U.S. App. Vet. Claims LEXIS 936 (June 6, 2019). It bears emphasizing that Appellant presents no such evidence to demonstrate that his headaches were capable of severe economic inadaptability. Appellant's argument ultimately amounts to a mere disagreement with how the Board weighed the evidence, which is not a basis for remand. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that it is within the Board's province to determine the credibility and weight of the evidence before it); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

C. The Board Properly Found That Appellant's Symptoms Related to PTSD Were Consistent With The General Level of Impairment Warranting a 30% Evaluation.

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

presence of certain symptoms, but also that those symptoms have caused overall occupational and social impairment to warrant a higher rating. *Vazquez-Claudio*, 713 F.3d at 117-18.

According to the general disability rating criteria for mental disorders, a 30% evaluation is warranted where the evidence shows:

> Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

38 C.F.R. § 4.130, DC 9411. A 50% disability rating is assigned for:

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

Id. A 70% disability rating is assigned for:

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

Id. A 100% disability rating is assigned for:

> Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communications; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Id.

Here, the Board provided adequate reasons or bases for its finding that the preponderance of the evidence was against finding that Appellant was entitled to a disability rating in excess of 30 percent. [R. at 13-17]; 38 C.F.R. § 4.130, DC 9411; *Gilbert*, 1 Vet.App. at 57. In his brief, Appellant essentially provides a list of symptoms that he argues should have been weighed differently, but any disagreement with the Board's weighing of the evidence cannot be a basis for remand. *Washington*, 19 Vet.App. at 368; *Gilbert*, 1 Vet.App. at 52. Furthermore, the Secretary notes that in many instances Appellant relies on evidence of symptoms that have been attributed to conditions other than PTSD. *See* App. Br. at 17-20; *see also* [R. at 17 (noting that Appellant's fatigue and chronic sleep impairment are separately service-connected, and thus, to compensate him for such symptoms in relation to his PTSD would be impermissible pyramiding under 38 C.F.R. § 4.14)].

While the symptoms listed within DC 9411 are not exhaustive, they are a guide for the Board to rely upon in determining the effect PTSD has on the claimant's social and occupational capabilities in order to qualify for a particular

disability rating. *Mauerhan*, 16 Vet.App. 436, 442 (2002). Here, the Board properly discussed Appellant's symptoms and found that his disability picture as a whole did not reflect symptoms necessary for a 50, 70, or 100%rating. [R. at 17]. Moreover, as stated previously, while symptoms are a critical component for consideration in mental health disabilities, the primary question is the degree of social and occupational impairment caused by those symptoms. 38 C.F.R. § 4.130, DC 9411; *see also Vazquez-Claudio*, at 117 (requiring an ultimate factual conclusion as to the veteran's level of impairment in most areas to warrant an increased 70% rating).

To that end, the record also fails to reflect, and Appellant fails to demonstrate, that his social and occupational impairment is to a greater degree than that contemplated within his 30% disability rating. *Gilbert*, 1 Vet.App. at 57. The Board addressed the evidence of record, applied the correct legal standards, and there is a plausible basis in the record as a whole for its findings. [R. at 13-17]; *Gilbert*, 1 Vet.App. at 53. Appellant fails to point to any evidence that demonstrates error in the Board's decision on appeal or that reflects that his overall disability picture reflects impairment warranting an increased disability rating. 38 C.F.R. § 4.130, DC 9411; *Mauerhan*, 16 Vet.App. at 442; *see Hilkert*, 12 Vet.App. at 151.

Contrary to Appellant's first argument, the Board did not deny a higher disability evaluation for his PTSD because he "was married and employed throughout the entire period on appeal and did not indicate any problems with

either his personal or work relationships." [R. at 16]. While the Board did make this notation, Appellant overlooks that the Board already provided a thorough review of Appellant's symptoms and that it proceeded to find that the symptoms Appellant described to VA examiners, including depression, anxiety, panic, attacks, loss of interest, and feelings of worthlessness, were contemplated by the 30% rating. [R. at 15-17]. Moreover, the Board noted how during the examinations of record, Appellant's affect was appropriate, he was goal directed, his behavior was appropriate and cooperative, and his insight and judgment were good, which is again in line with a 30% disability rating. [R. at 15-17]; 38 C.F.R. § 4.130, DC 9411. Thus, the Board was able to conclude that the impairment on Appellant's social and occupational functioning did not rise to the level to warrant a rating in excess of 30%. [R. at 16-17].

The evidence supports the Board's findings. [R. at 16-17]. In the October 2017 VA examination, the examiner found that Appellant's PTSD caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, selfcare and conversation, in line with the symptoms contemplated within a 30% rating. [R. at 826]; 38 C.F.R. § 4.130, DC 9411. The examiner also noted that Appellant's behavior, speech and thought processes were all within normal limits and Appellant was oriented to time, people and place. [R. at 832]. Appellant denied many symptoms, including impaired memory, impaired judgment, difficulty in

establishing and maintaining relationships, and difficulty in understanding complex commands. *Id*. Additionally, in another October 2017 treatment note, the examiner found that Appellant had adequate hygiene and grooming, was cooperative, his affect was full in range and congruent with mood, his speech was within normal limits, his thought process was logical and goal oriented, alert, his insight was fair, and his attention and concentration was within normal limits. [R. at 544-45]. Thus, the evidence of record supports the Board's factual finding that Appellant was not entitled to an increased rating.

Next, while Appellant argues that the record is "replete" with references to his occupational limitations, he overlooks that some degree of occupational impairment is already contemplated by a 30% rating. *See* 38 C.F.R. § 4.1 (stating that the percentage ratings represent the average impairment in earning capacity resulting from service-connected disabilities); 38 C.F.R. § 4.10 ("The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment."); *Amberman v. Shinseki*, 570 F.3d 1277, 1381 (Fed. Cir. 2009) (noting that "the amount of impairment is measured by the social and occupational difficulties caused by the veteran's disorder"). Additionally, Appellant fails to point to evidence that any occupational impairment related to PTSD rises to the level contemplated within a higher rating.

To support his argument regarding occupational functioning, Appellant relies on a December 2017 treatment note that reflects he lost his job after being given

negative feedback by his supervisor. App. Br. at 17; [R. at 126 (125-28)]. However, this does not reflect his quitting was related to PTSD. Indeed, the treatment provider stated that there was "a significant environmental mismatch" between Appellant and his previous jobs and suggested that he consider working in a field that was more in line with his core values and where he might have more in common with fellow employees. [R. at 126]. Thus, this record does not support a higher rating for PTSD. Appellant has also attributed losing jobs to effects from his service-connected chronic fatigue syndrome. [R. at 340 (October 2018 VA examination in which Appellant reported that he lost his job due to being sleepy)]. As the Board noted, to also compensate Appellant for such symptoms and effects in relation to his PTSD would be akin to pyramiding. [R. at 17]; 38 C.F.R. § 4.14.

As for a May 2018 vocational assessment relied upon by Appellant, App. Br. at 18, the assessment reflects that Appellant had difficulty holding jobs due to positions being too physical, a "toxic" relationship with a manager, desire for better income, tardiness, and the job itself causing anxiety. [R. at 282-83]. This evidence does not reflect symptomatology rising to the level of a 50% rating, and instead reflects occupational impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks as contemplated in a 30% rating. 38 C.F.R. § 4.130, DC 9411. The Board properly assessed the evidence of occupational impairment and had a plausible basis for its finding that it did not rise to a level that would warrant an increased rating. [R. at 13-17]; *Gilbert*, 1 Vet.App. at 53. As for Appellant's reliance on *Mittleider v. West*, 11 Vet.

App. 181 (2004), to argue that remand is warranted because the Board failed to discuss evidence of a "serious employment handicap," the Secretary responds that this is inapplicable as the evidence does not reflect any occupational impairment that rises to the level contemplated within a higher rating such that remand in this case may be warranted. App. Br. at 18; *Gilbert*, 1 Vet.App. at 53. Thus, the Court should reject Appellant's argument regarding occupational impairment.

Appellant's next argument concerns his social impairment. App. Br. at 19. He first notes and the Secretary concedes that the Board was incorrect in stating that he was married throughout the entire period on appeal. *Id*.; *see* [R. at 16, 42, 1227]. However, any such error is harmless as the evidence does not reflect that Appellant experienced difficulty in establishing and maintaining work and social relationships rising to the level to warrant an increased rating. 38 C.F.R. § 4.130, DC 9411. Moreover, the Board did not rely on his marriage as the sole reason for finding that an increased rating was not warranted. [R. at 16-17 (discussing Appellant employment, relationships, and symptoms)]. While the evidence relied upon by Appellant regarding his relationship with his wife (formerly girlfriend) reflect some problems in the relationship, he points to no evidence of difficulty in *establishing and maintaining* the relationship, much less any evidence of a general difficulty in establishing and maintaining relationships, which is what would be required for a higher rating. *Hilkert*, 12 Vet.App. at 151. Therefore, Appellant's argument is not persuasive.

Appellant then argues that a notation within an October 2017 examination that he had "thoughts of death" reflects that he had suicidal ideation. App. Br. at 19-20. But first, the evidence reflected no serious suicidal ideation, intent or plan. [R. at 832]. More importantly, the Board did not dismiss this evidence as passive suicidal ideation in violation of *Bankhead* . Rather, the Board discussed how Appellant reported passive thoughts of death, but also repeatedly denied suicidal or homicidal intent, ideation, or plan, coupled with the fact that during the examinations of record Appellant's behavior was appropriate, cooperative, and insight and judgment were good; all of these symptoms ultimately reflect that his overall mental health picture is contemplated by his currently assigned 30% rating. [R. at 17]; *see also* [R. at 95 (88-98), 831, 832]. Thus, contrary to Appellant's argument, the Board properly found that any thoughts of death did not give rise to additional impairment to warrant a higher rating. [R. at 16-17].

Ultimately, Appellant's arguments amount to a mere disagreement with the Board's weighing of the evidence, and failure to demonstrate evidence contrary to the Board's plausible factual findings. App. Br. at 16-20; *Washington*, 19 Vet.App. at 368. As these arguments fail to reflect that the Board did not have a plausible basis for its decision, the Court should affirm the Board's decision. *Gilbert*, 1 Vet.App. at 53.

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments. *See Woehlaert*, 21 Vet.App. at 463. The

Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully asserts that the Court should affirm the Board's December 17, 2018, decision.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Sarah W. Fusina
SARAH W. FUSINA
Deputy Chief Counsel

/s/ Margaret E. Sorrenti
MARGARET E. SORRENTI
Appellate Attorney
Office of the General Counsel (027H)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6790

Attorneys for Appellee
Secretary of Veterans Affairs