IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JEFFERY L. RIGBY,
Appellant,

v.

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

APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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v.	)	Vet.App. No. 19-1771
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

ON APPEAL FROM THE
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SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

1. Whether the Court should affirm the November 15, 2018, decision of the Board of Veterans' Appeals (Board), which denied entitlement to a rating in excess of 50% for major depressive disorder (MDD)[1].

[1] The Board decision also remanded the issues of entitlement to service connection for sleep apnea, to include upper airway resistance syndrome; whether the rating reduction from 20% to 0%, effective March 15, 2015, for status post anterior cruciate ligament (ACL) reconstruction was proper; entitlement to a compensable rating for status post ACL reconstruction; and entitlement to special monthly compensation for loss of use of a creative organ. As such, these issues are not currently before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Jeffery L. Rigby, appeals a November 15, 2018, Board decision [Record Before the Agency (R.) at 3-16], which denied entitlement to a rating in excess of 50% for service-connected MDD.

C. Statement of Relevant Facts

Appellant had active service with the United States Navy from October 1987 to August 1993. [R. at 1524].

Appellant filed a claim of entitlement to service connection for an acquired psychiatric disorder, as secondary to pain caused by other service-connected disabilities, in March 2014. [R. at 859-61]. In conjunction with his claim, Appellant was afforded a VA examination in September 2014. [R. at 650-55]. At that time, the examiner noted a diagnosis of major depressive disorder, severe, without psychosis. [R. at 650 (650-55)]. Appellant reported that he played golf on occasion, when he felt "okay," that he spent time with his children, and attended his children's baseball and football games. [R. at 651 (650-55)]. It was noted that he had been working for the U.S. Postal Service since 1995 and had been under

the care of a private psychiatrist for a couple of years. [R. at 652 (650-55)]. The examiner noted the presence of psychiatric symptoms in the form of depressed mood, chronic sleep impairment, and disturbances of motivation and mood. *Id*. The examiner opined that Appellant's MDD resulted in occupational and social impairment with reduced reliability and productivity. [R. at 650 (650-55)].

Based on the September 2014 VA examination, the Regional Office (RO) granted entitlement to service connection for MDD and assigned an initial 30% rating, effective April 28, 2014. [R. at 602-08]. Appellant filed a notice of disagreement (NOD) in June 2015, alleging that he was entitled to a higher disability rating based on the fact that he was taking prescription psychotropic medication, had "serious disturbances of motivation and mood," sleep impairment, and a Global Assessment of Functioning (GAF) score of 50. [R. at 246 (245-57)]. In conjunction with his NOD, Appellant submitted private treatment records that documented a diagnosis of depressive disorder, a prescription for Zoloft, and a May 2013 GAF score of 50. [R. at 252-54 (245-57)].

In September 2015, the RO issued a statement of the case (SOC), increasing Appellant's initial rating for MDD to 50%, based on the September 2014 VA examiner's assessment that Appellant had occupational and social impairment with reduced reliability and productivity. [R. at 105-35)]. Appellant perfected his appeal by way of an October 2015 VA Form 9 and the appeal was certified to the Board on May 19, 2016. [R. at 104]; [R. at 75].

Weighing all the evidence of record, in the November 15, 2018, decision, the Board determined that a rating in excess of 50% for service-connected MDD was not warranted. [R. at 3-16]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's November 15, 2018, decision that denied entitlement to an increased rating for MDD because Appellant has not persuasively demonstrated clear error.

Appellant argues that the Board should have considered a May 2013 GAF score of record, as it is dated prior to the effective date of the Fifth Edition of the Diagnostic and Statistical Manual for Mental Disorders (DSM-5), to be probative evidence of the severity of his MDD. However, contrary to this argument, as Appellant's appeal is governed by the DSM-5, GAF scores, regardless of the date they were provided, were appropriately *not* considered by the Board.

Additionally, Appellant argues that the Board ignored favorable evidence of record, in the form of a September 2014 Beck Depression Inventory score, suggesting severe depression. However, Appellant's argument in this regard amounts to nothing more than a disagreement with the Board's weighing of the evidence and Appellant has not shown that the Board's decision was clearly erroneous.

IV. ARGUMENT

A. This Court Should Affirm the November 15, 2018, Decision Denying Entitlement to a Rating in Excess of 50% for MDD because Appellant Demonstrates No Error, Let Alone Prejudicial Error, in the Board's Consideration, Weighing, and Discussion of the Evidence.

Factual determinations made by the Board are reviewed under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). Under this deferential standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990). Factual findings may be derived from 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). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

The controlling rating criteria permit the assignment of a 50% disability where the evidence of record shows the claimant's level of disability more nearly approximates:

> 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; difficulty in establishing and maintaining effective work and social relationships.

38 C.F.R. § 4.130. A 70% disability rating is available where the evidence shows:

> 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. Appellant has failed to show error in the Board's November 2018 decision which found that his MDD did not warrant a 70% rating under the applicable rating criteria.

It is well settled that the burden of showing error in a Board decision falls solely and entirely on the appellant. *Overton v. Nicholson,* 20 Vet.App. 427, 435 (2006) (holding that the appellant bears the burden of demonstrating error on appeal); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error).

Indeed, an appellant must not only identify the errors he or she alleges but must adequately develop any argument in support. *Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007) ("The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief."); *Locklear v. Nicholson,* 20 Vet.App. 410, 416 (2006) (explaining that Court

will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments"); *see also* U.S. Vet.App. R. 28(a)(5) (stating that an appellant's brief must contain "contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and pages of the record before the agency").

Further, the Court generally does not raise or develop new arguments on behalf of the parties. *Mountford v. Shinseki*, 24 Vet.App. 443, 448 (2011) ("It is not the practice of a court to raise new arguments for the parties."); *Cromer v. Nicholson,* 19 Vet.App. 215, 217 (2005) (providing that issues not raised on appeal are considered abandoned); *see also Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011) ("Courts do not usually raise claims or arguments on their own . . . and are generally limited to addressing the claims and arguments advanced by the parties.").

Here, Appellant's brief is undeveloped and unsupported. *See* Appellant's Brief (App. Brf.) at 1-8. Appellant's brief contains under 3 pages of argument and three citations to case law which are largely unsupportive of his argument and completely disregard controlling, relevant case law. Specifically, Appellant argues that the Board should have considered a GAF score of record, dated prior to August 4, 2014, when assessing the severity of his MDD.

As noted by Appellant, effective August 4, 2014, VA amended its disability rating schedule to reflect use of the DSM-5 in place of previous versions of the DSM. *See Schedule for Rating Disabilities—Mental Disorders and Definition of Psychosis for Certain VA Purposes*, 79 Fed. Reg. 45,093 (amending 38 C.F.R. §§ 3.384, 4.125, 4.126, 4.127, 4.130) (Aug. 4, 2014) (interim final rule). The change applies to cases certified to the Board after August 4, 2014. *See Schedule for Rating Disabilities—Mental Disorders and Definition of Psychosis for Certain VA Purposes*, 80 Fed. Reg. 14,308 (Mar. 19, 2015) (final rule). The DSM-5 eliminated use of GAF scores that had been used in previous editions. *See Golden v. Shulkin*, 29 Vet.App. 221, 224-25 (2018) (acknowledging that the DSM-5 "abandoned the GAF scale"). Thus, the Court held, "the Board errs when it uses GAF scores to assign a psychiatric rating in cases where the DSM-5 applies," that is, in appeals certified after August 4, 2014. *Golden*, 29 Vet.App. at 225.

Appellant's appeal was certified to the Board on May 19, 2016; DSM-5 applies. [R. at 75]. Therefore, it would have been improper for the Board to consider any GAF scores, regardless of the date that they were provided, particularly as this Court noted that GAF scores were removed from the DSM criteria based on their "conceptual lack of clarity" and "questionable psychometrics in routine practice." *Golden*, 29 Vet.App. at 224. Even if the Board had been obligated to consider GAF scores dated prior to August 4, 2014, which the Secretary does not concede, the GAF score referenced by Appellant here was provided in May 2013, nearly a year before Appellant filed his claim for service

connection. Appellant has provided no evidence or argument as to why this GAF score would provide a more accurate representation of the severity of Appellant's symptoms, beginning in April 2014, than the September 2014 VA examination report. Notably, Appellant has not argued or alleged that the September 2014 VA examination is in any way deficient or inadequate.

Next, Appellant argues that when it denied an increased rating for his MDD, the Board failed to consider the September 2014 Beck Depression Inventory screening, which revealed a score consistent with severe depression. App. Br. 6. Appellant has only argued that the Beck score revealed "severe" depression, he has not provided any argument as to why his currently assigned 50% rating does not adequately compensate him for such symptoms. Further, while the Secretary does not dispute that the Board did not specifically reference the Beck score in its November 2018 decision, this test was conducted as part of the September 2014 VA examination, which was discussed by the Board. [R. at 6 (3-16)].

In finding that the medical evidence of record did not support a rating in excess of 50%, the Board specifically relied on the VA examiner's determination that Appellant's MDD resulted in occupational and social impairment with reduced reliability and productivity. *Id*. Given that the September 2014 VA examiner performed the Beck Depression Inventory testing, it must be assumed that he was aware of the score suggesting severe depression when he provided his overall assessment of the severity of Appellant's disability. Further, it is worth noting that the record of the Beck screening includes a disclaimer that the results of the

screening are "not sufficient to use alone for diagnostic purposes." [R. 655 (650-55)].

Appellant has only cited to the May 2013 GAF score and the September 2014 Beck Depression inventory score as evidence that a higher rating was warranted for his MDD. He did not challenge the adequacy of the VA examination in his case, he did not assert that any evidence was mischaracterized by the Board, and he did not argue that the Board failed to consider any evidence other than these scores. Since the Court stated in *Golden* that GAF scores cannot be considered by the Board, a remand on this basis would serve no purpose in this case because the Board is prohibited from considering such evidence. 29 Vet.App. at 225. Further, as the Beck screening was conducted as part of the September 2014 examination, this evidence was inherently considered when the Board considered the totality of the examination, finding it the most probative evidence of record in the case and supportive of the 50% rating assigned.

Appellant bears the burden of first demonstrating the existence of an error in the Board's decision on appeal. *Hilkert,* Vet.App. at 151. Once he satisfies that burden, he must also demonstrate that the error was prejudicial. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); 38 U.S.C. § 7261(b)(2). He fails to carry either burden here.

In short, Appellant's arguments are undeveloped and unsupported by both the record and governing caselaw. While he has provided argument over the

probative value of certain pieces of evidence, he has failed to provide any argument or explanation as to how this evidence shows that the frequency or severity of his disability is not contemplated by the 50% rating assigned. It is Appellant's duty to identify the errors and adequately develop any argument in support. *Woehlaert,* 21 Vet.App. at 463; *Locklear,* 20 Vet.App. at 416. Most importantly, it is solely and entirely Appellant's burden to demonstrate error in the Board decision. *Overton,* 20 Vet.App. at 435. Appellant has failed to show or communicate prejudicial error in the Board's decision. *Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151.

The Secretary urges the Court to find that Appellant has abandoned any other arguments. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). However, the Secretary 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.

The Secretary also urges the Court to decline to entertain any attempts by Appellant to offer new, developed arguments in a reply brief. *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"); *Untalan v. Nicholson,* 20 Vet.App. 467, 471 (2006) (stating that this Court "has repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the

Court"); *see also Pieczenik v. Dyax Corp.,* 265 F.3d 1329, 1333 (Fed. Cir.2001) ("It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief."). As such, the Court should find that any issues not pursued, or arguments not made by Appellant in his opening brief are abandoned.

V. CONCLUSION

For the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits that the November 15, 2018, decision of the Board, which denied entitlement to a rating in excess of 50% for service-connected MDD, should be affirmed.

Respectfully submitted,

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