Vet.App. No. 19-2731

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

RALPH L. HARRIS,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

COLIN E. TANSITS
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6139

Attorneys for Appellee

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I. ISSUE PRESENTED

Whether the Court should affirm the December 28, 2018, Board of Veterans' Appeals (Board) decision, which denied Appellant's claim of entitlement: to a disability evaluation in excess of the granted 50% rating from November 17, 2011 to May 21, 2014; to a disability evaluation in excess of the granted 70% rating from May 22, 2014 to May 13, 2018; and to an effective date earlier than May 14, 2018, for the granted 100% rating for other specified trauma and stressor related disorder (previously, anxiety disorder not otherwise specified (NOS)).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Ralph L. Harris, appeals from a December 28, 2018, decision of the Board that denied Appellant's claim of entitlement: to a disability evaluation in excess of the granted 50% rating from November 17, 2011 to May 21, 2014; to a disability evaluation in excess of the granted 70% rating from May 22, 2014 to May 13, 2018; and to an effective date earlier than May 14, 2018, for the granted 100% rating for other specified trauma and stressor related disorder (previously, anxiety disorder NOS).

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Army from December 1967 through December 1969. (Record (R.) at 1287).

In August 2005, Appellant first submitted an application claiming entitlement to service connection for, *inter alia*, posttraumatic stress disorder (PTSD). (R. at 2442-2455). This claim was subsequently denied by the Roanoke, Virginia Regional Office (RO) in a November 2005 rating decision. (R. at 2384-2390). This decision was not appealed.

On November 17, 2011, Appellant submitted an application to reopen his August 2005 claim of entitlement to service connection for PTSD. (R. at 2378).

On January 13, 2011, the RO issued a decision conceding a PTSD stressor based on Appellant's service. (R. at 2372). The RO requested a VA examination six days later. (R. at 2346).

On February 7, 2012, Appellant underwent a VA PTSD examination. (R. at 2043-2053). During this examination, the psychologist found that although Appellant did not meet the criteria for a PTSD diagnosis, he did suffer from anxiety disorder NOS. (R. at 2044).

Following Appellant's PTSD examination, on February 28, 2012, the RO issued a rating decision granting Appellant entitlement to service connection for anxiety disorder NOS, effective November 17, 2011 and rated at 30% disabling. (R. at 2303-2313).

In May 2012, Appellant submitted a timely informal notice of disagreement, challenging the effective date and rating assigned in the RO's February decision. (R. at 2288-2291).

The RO issued a statement of the case on January 3, 2014, continuing its decision to assign a 30% rating for anxiety NOS effective November 17, 2011 and denying Appellant's claim for an earlier effective date and increased rating. (R. at 2152-2178).

In February 2014, Appellant submitted a VA Form 9, appealing the February 2012 rating decision to the Board. (R. at 2150).

Appellant continuously received mental health treatment between 2013 and the December 2018 Board decision. *See, e.g.* (R. at 2236-2241, 2179-2188, 1968-1969, 1956-1959, 1760-1764). Appellant's treatment included seeing Dr. Edwin W. Hoeper, who provided letters in May 2014 and August 2015, both of which diagnosed Appellant with PTSD and incorrectly stated he was service connected for PTSD. (R. at 1883-1884, 2142-2143).

On February 23, 2017, Appellant underwent another VA PTSD examination. (R. at 1646-1662). Following this examination, the psychologist opined that Appellant still did not meet the full criteria for a PTSD diagnosis. (R. at 1646). The psychologist also found that Appellant suffered from other specified trauma and stressor related disorder, which he explained was the same disorder as his previous diagnosis (anxiety disorder NOS), but with different nomenclature to reflect the updated DSM. *Id*.

In February 2017, the RO issued a supplemental statement of the case, continuing its decision to deny Appellant's claims for an earlier effective date and increased ratings, and continuing Appellant's current rating and effective date. (R. at 1631-1637). One month later, in April 2017, the RO issued another supplemental statement of the case, continuing the determinations made in its two previous iterations. (R. at 1553-1558).

On November 2, 2017, the Board issued a decision denying Appellant's claims of entitlement to an earlier effective date and an increased rating for his anxiety disorder NOS. (R. at 1500-1523).

In December 2017, Appellant submitted a supplemental claim for compensation, seeking, *inter alia*, an increased evaluation for PTSD. (R. at 1488-1489).

Appellant underwent a VA mental health disorder examination on January 23, 2018, and was again diagnosed with other specified trauma and stressor related disorder. (R. at 1181-1190).

On April 4, 2018, the RO issued a rating decision that, *inter alia*, denied Appellant's claim of entitlement to service connection for PTSD and denied his claim of entitlement to an increased evaluation for other specified trauma and stressor related disorder, while also continuing his previously assigned 30% rating. (R. at 487-498).

On May 5, 2018, Appellant submitted a notice of disagreement, disputing the April 2018 rating decision. (R. at 418-428).

On June 26, 2018, Appellant and the Secretary submitted a Joint Motion for Partial Remand (JMPR), which moved for a remand of the Board's November 2017 decision, to the extent that it denied Appellant entitlement to an initial evaluation in excess of 30% for anxiety disorder NOS. (R. at 215-222). In relevant part, the JMPR instructed the Board to

> discuss whether Appellant has been appropriately diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder, NOS, at any point during his appeal. If Appellant is found to have been diagnosed with any such mental disability, the Board should ensure that any necessary development be accomplished to determine (a) whether such disability is due to his military service, and, if so, (b) whether such disability resulted in symptomatology not

> currently contemplated by his 30% disability rating for his service-connected anxiety disorder, NOS.

(R. at 218-219). The Court granted this joint motion on July 2, 2018. (R. at 223).

On December 28, 2018, the Board issued a decision granting Appellant a 50% rating from November 17, 2011 to May 21, 2014, a 70% rating from May 22, 2014 to May 13, 2018, and a 100% percent rating from May 14, 2018 for other specified trauma and stressor related disorder (previously, anxiety disorder NOS). (R. at 5-15). In its decision, the Board explained,

> [i]n an April 2018 rating decision, the Veteran's service-connected psychiatric disorder was recharacterized as other specified trauma and stressor related disorder (previously, anxiety disorder). The Board notes further that to the extent that the Court directed the Board to adequately address additional psychiatric diagnoses of record other than anxiety such as posttraumatic stress disorder and dysthymic disorder, the Board finds that the evidence of record does not sufficiently distinguish the symptoms of any other diagnosed psychiatric disorder from his service-connected other specified trauma and stressor related disorder (previously, anxiety disorder NOS). Thus, the Board's instant discussion attributes all of the Veteran's mental health symptoms to his service-connected disorder. *Mittleider v. West*, 11 Vet. App. 181, 182 (1998).

Id. at 7. Appellant now challenges this decision.

III. SUMMARY OF THE ARGUMENT

The Board provided an adequate statement of reasons or bases regarding its rating decisions. By discussing the most relevant evidence, explaining its probative valuations regarding evidence favorable to Appellant, and providing a clear, coherent analysis, the Board adhered to its legally mandated explanatory duties. In fact, the Board considered and discussed the evidence Appellant argues

for in his brief, such as his February 2012 VA examination and the letters from his private physician.

Likewise, the Board substantially complied with the July 2018 Remand Order. As the Board's decision and the Secretary's Brief indicate, the Board followed the instructions of the JMPR by discussing whether Appellant has been appropriately diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder, NOS. Moreover, because the Board found Appellant's other mental health symptoms to be indistinguishable from his service-connected other specified trauma and stressor related disorder, no additional development was required under the JMPR.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases, substantially complied with the July 2018 Remand Order, and further, that Appellant has not shown that any of the Board's findings or determinations were clearly erroneous.

IV. ARGUMENT

A. The Board Provided an Adequate Statement of Reasons or Bases Regarding its Rating Determination.

The Board adequately discussed and analyzed the evidence, including that which Appellant asserts it did not in his brief, and appropriately applied Appellant's symptoms to the rating code. Moreover, Appellant has not shown that these determinations were clearly erroneous.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2018); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). This generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir. 1996) (table). Likewise, the Board's statement of reasons or bases must be "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1) (2018).

A determination by the Board as to the proper evaluation of a disability is a factual determination subject to review under the deferential "clearly erroneous" standard. *Pierce v. Shinseki*, 18 Vet.App. 440, 443 (2004); *see Gilbert*, 1 Vet.App. at 52-53 (finding of fact is not clearly erroneous if there is a plausible basis for it in the record). Similarly, the Board has significant discretion when assessing the evidence, how it interprets that evidence, the weight it assigns to it, and what, if any, inferences it draws from that evidence. 38 U.S.C. § 7261(a)(4) (2018).

Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52 (emphasis added); *see also Anderson v. City of Bessemer City,*

N.C., 105 S.Ct. 1504 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

a. Effective Date Earlier Than May 22, 2014 for 70% Rating.

Regarding the decision to grant Appellant entitlement to a 50% rating, but no higher, from November 17, 2011 to May 21, 2014, the Board provided an adequate statement of reasons or bases. Specifically, the Board discussed and considered Appellant's medical history, including a February 2012 VA examination, social work notes from 2013 and 2014, clinical notes, and Appellant's lay statements, before offering an explanation of why a 50% rating was appropriate. (R. at 9-10, 13). In fact, the Board explicated that the "record does not reflect that the Veteran has demonstrated the symptoms associated with a 70 percent rating, or other symptoms of similar severity, frequency, and duration prior to May 22, 2014," and offered further clarification regarding the symptoms Appellant did and did not exhibit. (R. at 13). Because this explanation relates the facts and symptoms of record to the rating criteria in a clear, coherent manner, it certainly instructs Appellant on how the Board arrived at a 50% rating and it also facilitates judicial review. As such, the Board's statement of reasons or bases is adequate, and its rating determination is not clearly erroneous.

Appellant argues that the Board failed to provide an adequate statement of reasons or bases explaining why it discounted favorable evidence showing rating criteria associated with a higher rating. (Appellant's Brief (App.) at 3). Specifically, Appellant alleges broadly that the Board "seemingly ignored" his medical record,

and specifically, that it did not consider record evidence from his February 2012 VA examination, June 2013 social work consult, and February 2014 VA Form 9. (App. at 4-5). Regrettably, Appellant is incorrect in his assessment of the Board's decision, and his argument is unpersuasive. In its decision, the Board *did* specifically note and consider Appellant's February 2012 VA examination and the Board *did* specifically note and consider social work notes from 2013 and 2014. (R. at 9).

Moreover, the absence of a specific reference to Appellant's VA Form 9 does not render the Board's statement of reasons or bases inadequate, because, as this Court has often held, the Board does need not comment upon every piece of evidence contained in the record. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir. 2007). In fact, even without reference to the VA Form 9, the Board still noted Appellant's work history and struggles therewith. *See* (R. at 9). Thus, contrary to Appellant's assertions, the Board did consider this evidence, the Board did provide an adequate statement of reasons or bases, and Appellant was not denied an opportunity for meaningful judicial review.

b. Effective Date Earlier Than May 14, 2018 for 100% Rating.

Regarding the decision to grant Appellant entitlement to a 70% rating, but no higher, from May 22, 2014 to May 13, 2018, the Board, again, provided an adequate statement of reasons or bases. Much like its analysis and stated rationale for assigning a 50% rating between 2011 and 2014, here, the Board adequately discussed and considered Appellant's medical history. (R. at 10-12).

This discussion included the May 2014 and August 2015 letters from Appellant's private physician, October 2016 clinical notes, a February 2017 VA examination, October 2018 clinical notes, an October 2018 disability benefits questionnaire, and Appellant's lay statements. *Id*. Following this explicit notation of Appellant's medical history, the Board provided a clear explanation of why a 70% rating was appropriate, citing to Appellant's exhibited symptoms and discussing the probative value of various pieces of evidence. (R. at 13).

This discussion and subsequent analysis meets the reasons or bases standard, because it illustrates that the Board analyzed the probative value of the evidence, accounted for that which it found persuasive or unpersuasive, and explained the basis of its rejection of evidence materially favorable to Appellant. *See Caluza*, 7 Vet.App. at 506. Likewise, it shows that Appellant was adequately informed of the bases for the Board's rating determination. *See* (R. at 14) (discussing why a 70% rating is most appropriate in light of the facts and symptoms).

Appellant again argues that the Board failed to adequately explain its basis for disregarding favorable evidence showing entitlement to a higher rating during the specified period of time. (App. at 6-7). Specifically, Appellant points to his February 2014 VA Form 9 and the May 2014 letter from a private physician as favorable evidence that the Board did not consider. *Id*. Again, Appellant's argument is mistaken. In fact, the Board explicitly considered and discussed the May 2014 letter, and found it less probative than the VA examinations. (R. at 13-

14). Such a determination is squarely within the Board's powers. *D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008); *Owens v. Brown,* 7 Vet.App. 429, 433 (1995); *Guerrieri v. Brown*, 4 Vet.App. 467, 471 (1993). Furthermore, as explained above, the Board does need not comment upon every piece of evidence contained in the record, and its failure to specifically reference Appellant's VA Form 9 is not a dispositive issue. *See Newhouse*, 497 F.3d at 1302. Therefore, as illustrated by the foregoing, the Board did consider this evidence, the Board did provide an adequate statement of reasons or bases, and Appellant was not denied an opportunity for meaningful judicial review.

Regarding both of the rating assignments with which Appellant disagrees, his arguments imply a general disagreement with the Board's evidentiary evaluations and rating assessments, rather than the Board's actual statement of reasons or bases. As demonstrated in the Board's decision and in the Secretary's Brief, however, the Board's probative valuations and rating determinations are not clearly erroneous.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases for its decision, and that Appellant has not met his burden to show otherwise. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

B. The Board Substantially Complied with the July 2018 Remand Order.

The Board's finding in regard to Appellant's other mental health symptoms strictly complies with the requirements of the July 2018 Remand Order. Appellant's arguments to the contrary neglect this fact, and overlook the language limiting the Board's mandate to undertake additional development.

A remand by the Court or the Board "confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). While this imposes on the Secretary an obligation to ensure compliance with the terms of a remand order, it is substantial compliance, not strict or absolute compliance, that is required. *D'Aires*, 22 Vet.App. at 105.

The Board's determination of whether there has been substantial compliance with a prior remand is a finding of fact to be reviewed under the "clearly erroneous" standard. *See Gill v. Shinseki*, 26 Vet.App. 386, 391-392 (2013), *aff'd per curiam sub nom*. *Gill v. McDonald*, 589 F. App'x 535 (Fed.Cir. 2015).

Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52 (emphasis added); *see also Anderson*, 105 S.Ct. at 1504 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

When reviewing evidence of a claimed mental disability, the Board should not limit its consideration to Appellant's lay belief of his own diagnosis. *Clemons v. Shinseki*, 23 Vet.App. 1, 6 (2009). Moreover, the Board must weigh and assess the nature of a claimant's current condition when determining the breadth of the claim before it. *Id*.

Here, the Board substantially complied with the July 2018 Remand Order, because it followed the mandate in *Clemons v. Shinseki* by considering Appellant's claimed mental health disabilities in a broader scope, and discussed whether Appellant has been appropriately diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder, NOS. (R. at 7); *see also* (R. at 216-222). Specifically, the Board explained

> In an April 2018 rating decision, the Veteran's service-connected psychiatric disorder was recharacterized as other specified trauma and stressor related disorder (previously, anxiety disorder). The Board notes further that to the extent that the Court directed the Board to adequately address additional psychiatric diagnoses of record other than anxiety such as posttraumatic stress disorder and dysthymic disorder, the *Board finds that the evidence of record does not sufficiently distinguish the symptoms of any other diagnosed psychiatric disorder* from his service-connected other specified trauma and stressor related disorder (previously, anxiety disorder NOS). Thus, the Board's instant discussion attributes all of the Veteran's mental health symptoms to his service-connected disorder. *Mittleider v. West*, 11 Vet. App. 181, 182 (1998).

(R. at 7) (emphasis added).

This Board finding strictly complies (opposed to the lesser requirement of substantial compliance) with the July 2018 Remand Order, as it is a discussion and conclusion on the issue of whether Appellant has been appropriately

diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder, NOS. *Compare* (R. at 7) *with* (R. at 218-219). Moreover, it demonstrates that the Board considered Appellant's claim within a broader scope, as required by *Clemons*. *See* 23 Vet.App. at 6. Quite simply, this is a clear example of the Board following the directive in the JMPR, and Appellant has not shown evidence indicating otherwise.

Appellant argues that the Board did not substantially comply with the July 2018 Remand Order, because it "erroneously based [its finding] on . . . its own medical judgment," and that it failed to adequately discuss Appellant's diagnosed posttraumatic stress disorder and dysthymic disorder. (App. at 8-10). Appellant's argument is unpersuasive, however, as the Board did not exercise medical judgment and sufficiently discussed the impact of Appellants other diagnosed psychiatric symptoms on his rating. Contrary to Appellant's assertions, the Board's finding that "the *evidence of record* does not sufficiently distinguish the symptoms of any other diagnosed psychiatric disorder from his service-connected other specified trauma and stressor related disorder (previously, anxiety disorder NOS)" is a factual determination based upon record review, *not* a medical determination. (R. at 7) (emphasis added).

The Board, as factfinder, is permitted to make such factual findings. *Pierce*, 18 Vet.App. at 443; *see also Gilbert*, 1 Vet.App. at 52-53. Similarly, the Board did participate in an "adequate discussion" of Appellant's other symptoms, as it did *exactly* what the JMPR instructed it to do—"discuss whether Appellant has been

appropriately diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder NOS." *Compare* (R. at 7) *with* (R. at 218-219).

Appellant also argues that the Board did not engage in the development required by the July 2018 Remand Order. (App. at 9-10, 5, 7). Unfortunately, Appellant fails adequately grasp the nature of the remand's "additional development" instruction. As Appellant aptly notes, the JMPR instructs the Board that

> [i]f Appellant is *found* to have been diagnosed with any such mental disability, the Board should ensure that any necessary development be accomplished to determine (a) whether such disability is due to his military service, and, if so, (b) whether such disability resulted in symptomatology not currently contemplated by his 30% disability rating for his service-connected anxiety disorder, NOS.

(R. at 219) (emphasis added); *see also* (App. at 8). However, as established above, the Board's record review indicated that Appellant's symptoms of other diagnosed psychiatric disorders (such as PTSD or dysthymic disorder) were indistinguishable from his service-connected other specified trauma and stressor related disorder (previously, anxiety disorder NOS). (R. at 7). Therefore, because Appellant was not *found* to have been diagnosed with "any such mental disability," no additional development was required, and the Board did not commit error.

Accordingly, the Court should find that the Board substantially complied with the July 2018 Remand Order, and further, that Appellant has not met his burden to show that a substantial compliance determination is clearly erroneous. *See*

Hilkert, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

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

It is axiomatic that issues or arguments not raised on appeal are abandoned. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed.Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's brief have therefore been abandoned.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully submits that the December 28, 2018, Board decision should be affirmed in all respects.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Edward V. Cassidy, Jr.
EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

/s/ Colin E. Tansits

COLIN E. TANSITS
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6139