IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BILLY STORY,

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

CHRISTOPHER W. WALLACE
Deputy Chief Counsel

ANNA M. CASTILLO
Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6133
anna.castillo50@va.gov

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Record Before the Agency

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BILLY STORY,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-0116
	)	
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 vacate and remand the portion of the September 10, 2018, Board of Veterans' Appeals (Board or BVA) decision, which denied service connection for peripheral neuropathy of the bilateral upper and lower extremities, claimed as due to herbicide agent exposure.

2) Whether the Court should affirm the portion of the Board's September 10, 2018, decision which denied entitlement to an initial rating greater than 50% for service-connected posttraumatic stress disorder (PTSD) with bipolar disorder from July 22, 2010.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant, Billy Story, appeals the September 10, 2018, Board decision which denied entitlement to (1) an initial rating greater than 50% for service-connected PTSD with bipolar disorder from July 22, 2010, and (2) service connection for peripheral neuropathy of the bilateral upper and lower extremities, claimed as due to herbicide agent exposure. *See* [Appellant's Brief [AB] at 1-25]; *see generally* [Record Before the Agency [R.] at 4 (3-23)].

C. Statement of Relevant Facts

Appellant had active duty service from March 1968 to March 1970. [R. at 1727].

He first filed a claim for benefits in July 2010 seeking entitlement to service connection for PTSD and, in September 2011, the regional office (RO) granted service connection for PTSD with bipolar disorder with a 30% disability rating effective July 22, 2010. *See* [R. at 1938 (1938-42) (September 10, 2011, Rating Decision)], [R. at 2015 (September 2010 Statement in Support of Claim)], [R. at 2056 (July 2010 Statement in Support of Claim)]. Appellant filed a timely notice of disagreement (NOD) challenging the assigned 30% rating for his PTSD and

arguing that his symptoms warranted a 50% rating. [R. at 1901]. A statement of the case (SOC) issued in November 2013 continued the 30% rating. [R. at (1860-82)]. He filed a timely appeal to the Board and, in September 2017, the Board remanded the appeal back to the RO for further development. *See* [R. at 1082-83 (1079-83) (September 20, 2017, Board Remand Order)], [R. at 1855-56 (VA Form 9)]. In September 2017, a supplemental statement of the case (SSOC) issued continuing the initial 30% rating for PTSD prior to November 15, 2017, and granting a 50% rating, but no greater, beginning November 15, 2017. *See* [R. at 914-17 (904-18) (November 2017 SSOC)]; *see also* [R. at 899-901 (November 2017 rating decision)].

In September 2016, Appellant filed another claim for benefits seeking service connection for bilateral peripheral neuropathy of the lower extremities, associated with exposure to herbicides, which the RO denied in November 2016. *See* [R. at 1112-1117 (November 15, 2016, rating decision)], [R. at 1574 (September 2016 claim for benefits)]. He filed a timely NOD and in March 2018, an SOC issued continuing the denial. *See* [R. at 880-85 (838-85) (March 13, 2018, SOC)], [R. at 1092-93 (January 2017 NOD)]. Appellant filed a timely appeal to the Board. [R. at 47].

In September 2018, the Board granted a 50% rating, but no higher, from July 22, 2010, for Appellant's service-connected PTSD with bipolar disorder and denied entitlement to service connection for peripheral neuropathy of the bilateral upper and lower extremities. [R. at 4 (3-23)]. This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should vacate and remand the Board's decision denying Appellant's claims for entitlement to service connection for peripheral neuropathy of the bilateral upper and lower extremities because the Board clearly erred when it relied on an inadequate medical examination to deny the claims. However, affirmance is warranted for the claim of entitlement to an initial rating in excess of 50% for service-connected PTSD with bipolar disorder because the Board's determination that Appellant's symptoms resulted in occupational and social impairment with reduced reliability and productivity has plausible basis in the record and its statement of reasons or bases adequately facilitates judicial review. Lastly, the Board did not err when it did not address the issue of entitlement to a rating of total disability based on individua unemployability due to a service-connected disability because the issue was neither explicitly raised by Appellant nor reasonably raised by the record.

IV. ARGUMENT

A. The Court Should Vacate And Remand The Board's Denial Of Entitlement To Service Connection For Peripheral Neuropathy Of The Bilateral Upper And Lower Extremities Because The Board Erred In Failing To Provide An Adequate Medical Examination.

The Board clearly erred in denying the claim of entitlement to service connection for peripheral neuropathy of the bilateral upper and lower extremities which warrants remand because it failed to ensure VA satisfied its duty to assist when it relied on an inadequate medical examination.

The Board must provide a statement of reasons or bases sufficient to enable a claimant and this Court to understand the basis of its decision. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). This reasons or bases requirement generally 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). Whether an examination is adequate and to the extent to which, if any, it is probative of the relevant medical questions, are factual determinations that may not be disturbed unless clearly erroneous. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

The Secretary is not required to provide a medical examination in every case but when he undertakes the effort to provide an examination, even if not statutorily obligated to do so, he must provide an adequate one. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). An adequate medical opinion must be based upon a consideration of the relevant evidence and must provide the Board with a foundation sufficient enough to evaluate the probative worth of that opinion. *See Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). This requires the examiner to not only render a clear conclusion on the relevant medical question but to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007).

Vacatur and remand is warranted because the November 2016 examination the Board relied on to deny service connection for peripheral neuropathy of the

bilateral upper and lower extremities failed to provide adequate rationale to support its conclusion that the claimed conditions had no relationship to Appellant's service, including as due to exposure to herbicide agents. *See* [R. at 17, 19-20]; *see also* [R. at 1135 (1127-35)]. The November 2016 examiner opined that Appellant's peripheral neuropathy had its "onset outside the expected window" and "lasted longer than the expected time course" for any peripheral neuropathy "expected to result" from Agent Orange exposure "within the current prescribed guidelines for presumptive [service connection] of that condition." [R. at 1135]. However, as this Court previously explained, "[t]o permit the denial of service connection for a disease on the basis that it is not likely there is any nexus to service solely because the statistical analysis does not support presumptive service connection, would, in effect, permit the denial of direct service connection simply because there is no presumptive service connection." *Polovick v. Shinseki*, 23 Vet.App. 48, 55 (2009).

Here, the November 2016 examiner failed to consider any risk factors specific to Appellant and based his conclusion simply on the fact that the claimed condition had its onset and duration beyond the time "expected" for presumptive service connection. [R. at 1135]; *see also Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007). Because the Board relied on this exam in denying the claim, it failed to ensure that VA satisfied its duty to assist in providing an adequate exam. *See Barr*, 21 Vet.App. at 311.

Based on the above, the Court should vacate the Board's decision denying entitlement to service connection for peripheral neuropathy of the bilateral upper and lower extremities and remand the matter for further development and readjudication.

B. The Board's Determination That Appellant's Service-Connected PTSD With Bipolar Disorder Most Closely Approximated A 50% Rating Has Plausible Basis In The Record And Is Supported By An Adequate Statement Of Reasons Or Bases.

Appellant asserts that the Board failed to provide an adequate statement of reasons or bases in denying entitlement to a rating greater than 50% for his service-connected PTSD with bipolar disorder. [AB at 15-24]. Contrary to Appellant's contentions, the Board considered all of the symptoms associated with his service-connected psychiatric disability and correctly applied the 50% rating regulation. Because the Board's determination has plausible basis in the record and supported by an adequate statement of reasons or bases, the Court should affirm its determination.

Pursuant to the general rating formula for mental disorders, a 30% rating is warranted where the claimant has occupational and social impairment with reduced reliability and productivity; a 70% rating is assigned for occupational and social impairment with deficiencies in most areas; and a 100% rating is assigned for total occupational and social impairment. 38 C.F.R. § 4.130. Each of these ratings specifies symptoms that are deemed examples of that level of impairment. *Id*. (e.g., the 50% rating criteria identifies "such symptoms as: flattened effect;

circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week," etc.).

When deciding the appropriate evaluation of a mental health disorder under 38 C.F.R. § 4.130, "symptomatology should be the fact-finder's primary focus." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013). A veteran's entitlement to a particular evaluation requires that he or she demonstrate "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 social and occupational impairment. *Id*. at 118.

First, Appellant argues that the Board failed to consider and discuss evidence that he experienced auditory hallucinations, which is contemplated by the 100% rating criteria. [AB at 17-18]. Although Appellant reported occasionally hearing voices, the medical evidence of record demonstrates that mental healthcare professionals frequently found he did not endorse hallucinations, delusions, or psychosis. *See* [R. at 9]. Specifically, examiners have found that, despite his reports of occasionally hearing voices and "smell[ing] death[,]" medical examiners still found that he exhibited neither auditory or visual hallucinations nor delusional thoughts. *See, e.g.*, [R. at 644 (641-45) (November 2017 Psychiatry note finding no auditory or visual hallucinations and no delusional thoughts)], [R. at 1322 (1321-23) (January 2014 mental health note finding no psychosis)], [R. at

1336 (1334-37) (October 2013 mental health note)], [R. at 1372 (1371-74) (May 2013 mental health note)]. These are medical conclusions which the Board may not refute. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (the Board may not "refut[e] the expert medical conclusions in the record with its own unsubstantiated medical conclusions"). Appellant's contention that the Board ignored evidence that he experienced "persistent auditory and olfactory hallucinations" is contrary to the medical evidence of record which repeatedly showed he did not exhibit such symptoms throughout the appeal period. *See id*. In its decision, the Board determined that Appellant was not entitled a rating greater than 50% because the evidence did not show total occupational and social impairment due such symptoms including persistent delusions or hallucinations, which is a finding that has a plausible basis in the record. [R. at 13]; *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (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).

Similarly, Appellant contends that the Board failed to consider evidence that he got lost, which he argues is indicative of disorientation. [AB at 19]. However, he ignores the multitude of medical evidence which show that he was consistently oriented to person, place, situation, and date and with no abnormalities in memory. *See, e.g.*, [R. at 644], [R. at 1322], [R. at 1335-36], [R. at 1372]. In this regard, it appears that Appellant merely disputes the way the Board interpreted and weighed the evidence, which is not a basis for remand. *See Gilbert*, 1 Vet.App. at 52.

He also asserts that the Board failed to consider evidence that he had difficulty adapting to stressful circumstances which "resulted in physical manifestations" including his teeth and hair falling out, which "interfered with his ability to work." *See* [AB at 19]; *see also* [R. at 2003 (2001-03) (October 2010 mental health note indicating that Appellant was "feeling completely incapable of working to support his family due to a high degree of stress")]. [R. at 11-12]. However, the Board discussed evidence demonstrating that Appellant's "ability to respond appropriately to coworkers, supervisors, or the general public" or to changes in a work setting was considered "moderately impaired." *See* [R. at 11-12]; *see also* [R. at 931 (921-32) (November 2011 VA examination)]. Again, Appellant here is merely attempted to reweigh the evidence.

Appellant further contends that the Board improperly found that there was no evidence to indicate a deficiency in family relations or work despite evidence that his 14 year-old son was removed from his home and placed with his grandparents due to his mental health issues and that he had a "history of being violent to family and co-workers," and that he had broken up with his girlfriend. [AB at 20, 23]. However, this argument is nothing but a disagreement with the Board's interpretation and weighing of the evidence. Indeed, the Board acknowledged that custody of Appellant's son had been transferred to his grandparents due to his mental health issues but found that at that time he still reported that he maintained a good relationship with his girlfriend, son, and his neighbors. *See* [R. at 10]; *see also* [R. at 1981 (1970-83) (June 2011 VA examination)]. The Board concluded

that during the appeal period Appellant's symptoms were productive of occupational and social impairment with reduced reliability and productivity as he was able to maintain social relationships. [R. at 13-14]. Indeed, the Board's conclusion has plausible basis in the record as the evidence demonstrates that he had maintained a 23-year relationship with his girlfriend, had regular telephonic contact with his three adult children, and keeps close relationships with his brother and sister. [R. at 11]; *see also* [R. at 922 (November 2017 VA examination where Appellant denied any significant familial relationship problems)].

Appellant merely highlights isolated events of record but fails to show how the Board clearly erred in finding that he did not have occupational and social impairment with deficiencies in most areas or total occupational and social impairment. *See Hilkert v.* West, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error). In fact, the Board acknowledged these isolated circumstances when it found that while Appellant exhibited symptoms contemplated in higher ratings during the appeal period, these instances did not amount to "distinct periods of time" which would warrant a rating greater than 50%. [R. at 14]; *see Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007) (staged ratings are appropriate when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings).

Appellant's argument revolves around the Board's failure to consider evidence he believes is indicative of "difficulty in adapting to stressful circumstances," "spatial disorientation," and "persistent delusions or

hallucinations," which are symptoms associated with the 70 and 100% ratings. *See* [AB at 17-24]. However, he has wholly failed to demonstrate how any of this purported evidence resulted in occupational and social impairment, with deficiencies in most areas, or total occupational and social impairment which is required by the rating criteria. *See* [AB at 21]; *see also* 38 C.F.R. § 4.130. Because Appellant fails to demonstrate that the Board's decision that his symptoms did not warrant a rating in excess of 50% did not have plausible basis in the record, the Court should affirm the Board's decision. *See Gilbert*, 1 Vet.App. at 52.

C. The Board Did Not Err When It Did Not Address The Issue Of TDIU Because The Evidence Did Not Reasonably Raise This Issue.

Appellant contends that that the Board erred in failing to provide an adequate statement of reasons or bases when it did not address whether the evidence reasonably raised the issue of TDIU. [AB at 23-24]. While a claim for an increased disability rating encompasses the issue of possible entitlement to TDIU, here the issue had not been raised because evidence of unemployability had not been presented. Thus, the Board's determination that any other issues apart from the issue of an increased rating for PTSD were neither raised by Appellant, nor the reasonably raised by the record, has plausible basis in the record and should be affirmed.

This Court has held that "a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or

disabilities." *Rice v. Shinseki*, 22 Vet.App. 447, 453 (2009). The Federal Circuit had held that VA must consider TDIU as part of the issue of a proper disability rating whenever there is "cogent evidence of unemployability, regardless of whether [the claimant] states specifically that he is seeking TDIU benefits." *Comer v. Peake*, 552 F.3d 1362, 1366 (Fed. Cir. 2009).

Here, as evidence of unemployability, Appellant points to 2010 statement and a Social Security Administration (SSA) benefits determination. [AB at 23]; *see also* [R. at 2050 (2044-51) (2010 statement)], [R. at 959 (958-69) (SSA report)]. In his 2010 statement, Appellant reported being unemployed for one year and alleging that employers do not want to hire him because of his age. [R. at 2050]. Second, in the SSA report, the SSA determined that Appellant was disabled under section 202.02 of the Medical-Vocational Guidelines primarily as due to a severe nonservice-connected back disorder and with non-severe anxiety disorder as a secondary. [R. at 958, 963]. The record also contains evidence that Appellant ceased working at his last employment in the construction industry due to physical injuries incurred during this employment. [R. at 1981].

While the record contains evidence of unemployability, he has not pointed to any evidence which indicates that his service-connected PTSD caused his unemployability. *See Rice*, 22 Vet.App. at 453 (holding that entitlement to TDIU is not a separate claim when it arises as part of a claim for benefits for a specific condition). Because the issue of entitlement to TDIU was neither raised explicitly

by Appellant nor reasonably raised by the record, Appellant fails to demonstrate error in the Board's failure to discuss the issue. *See Hilkert*, 12 Vet.App. at 151.

V. CONCLUSION

Based upon the foregoing, the Secretary respectfully submits that the Court vacate and remand the portion of the Board's decision which denied entitlement to service connection for peripheral neuropathy of the bilateral upper and lower extremities and affirm the portions which denied entitlement to an initial rating in excess of 50% for PTSD with bipolar disorder from July 22, 2010, and which declined to address the issue of TDIU.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Anna M. Castillo
ANNA M. CASTILLO
Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6133
anna.castillo50@va.gov

Attorneys for Appellee Secretary
of Veterans Affairs