

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

NANCY THOMPSON,
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
RECORD CITATIONS	iv
I. ISSUE PRESENTED.....	1
II. STATEMENT OF THE CASE	1
A. Jurisdictional Statement.....	1
B. Nature of the Case.....	2
C. Statement of Relevant Facts	2
III. SUMMARY OF THE ARGUMENT.....	4
IV. ARGUMENT	5
A. The Board Provided an Adequate Statement of Reasons or Bases for its Decision to Deny Appellant's Claim for an Increased Rating.....	5
B. The June 2016 VA Examination was Adequate.	10
C. Appellant Has Abandoned All Issues Not Argued in Her Brief	13
V. CONCLUSION	13

TABLE OF AUTHORITIES

Federal Cases

<i>Acevedo v. Shinseki</i> , 25 Vet.App. 286 (2012).....	10
<i>Anderson v. Bessemer City, N.C.</i> , 105 S.Ct. 1504 (1985)	11
<i>Ardison v. Brown</i> , 6 Vet.App. 405 (1994).....	10
<i>Bankhead v. Shulkin</i> , 29 Vet.App. 10 (2017)	7, 8
<i>Berger v. Brown</i> , 10 Vet.App. 166 (1997)	10, 13
<i>Bucklinger v. Brown</i> , 5 Vet.App. 435 (1993)	13
<i>Caffrey v. Brown</i> , 6 Vet.App. 377 (1994)	11, 12
<i>Caluza v. Brown</i> , 7 Vet.App. 498 (1995).....	5
<i>D'Aries v. Peak</i> , 22 Vet.App. 97 (2008)	11
<i>Disabled Am. Veterans v. Gober</i> , 234 F.3d 682 (Fed.Cir. 2000)	13
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990)	5, 9, 11
<i>Hilkert v. West</i> , 12 Vet.App. 145 (1999).....	9, 13
<i>Hood v. Shinseki</i> , 23 Vet.App. 295 (2009)	11
<i>Kirkpatrick v. Nicholson</i> , 417 F.3d 1361 (Fed.Cir. 2005)	2
<i>Mauerhan v. Principi</i> , 16 Vet.App. 436 (2002)	7
<i>Mayfield v. Nicholson</i> , 19 Vet.App. 103 (2005)	6
<i>Medrano v. Nicholson</i> , 21 Vet.App. 165 (2007)	2
<i>Newhouse v. Nicholson</i> , 497 F.3d 1298 (Fed.Cir. 2007)	5, 9
<i>Pederson v. McDonald</i> , 27 Vet.App. 276 (2015).....	13
<i>Steffl v. Nicholson</i> , 21 Vet.App. 120 (2007)	10
<i>Williams v. Gober</i> , 10 Vet.App. 447 (1997).....	13

United States Code

38 U.S.C. § 7104	5
38 U.S.C. § 7252	1

Code of Federal Regulations

38 C.F.R. § 3.327	11
38 C.F.R. § 4.130	6, 7

RECORD CITATIONS

R. at 5-18 (January 2019 Board Decision)	4, 8, 9
R. at 309-310 (November 2017 Letter)	12
R. at 313 (August 2017 Docketing)	4
R. at 322-323 (April 2017 VA Form 9)	4
R. at 327-360 (March 2017 Statement of the Case)	4
R. at 379-388 (November 2016 Notice of Disagreement)	4, 12
R. at 400 (DD Form 214)	2
R. at 409-418 (July 2016 Rating Letter)	3
R. at 427-437 (July 2016 Rating Decision)	3
R. at 450-459 (June 2016 VA Examination)	3, 11
R. at 515-516 (May 2016 Letter)	3
R. at 656 (DD Form 214)	2
R. at 672 (February 2016 Letter)	3
R. at 776-779 (January 2016 Claim)	2
R. at 789-792 (October 2015 Claim)	3

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

NANCY THOMPSON,
Appellant,

v.

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

)
)
)
)
)
)
)
)
)

Vet. App. No. 19-3501

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the January 31, 2019, Board of Veterans' Appeals (Board) decision, which denied a claim of entitlement to a rating in excess of 50% for adjustment disorder.

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, Nancy Thompson, appeals from a January 31, 2019, decision of the Board that denied entitlement to a rating in excess of 50% for adjustment disorder.

Importantly, in this decision, the Board also granted entitlement to service connection for posttraumatic stress disorder and entitlement to a 30% rating for a skin condition, and found new and material evidence sufficient to reopen a claim of entitlement to service connection for bilateral breast cancer. The Court should not disturb these findings, as they are favorable to Appellant. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (holding that the Court may not disturb favorable findings).

The Board also remanded the issue of entitlement to service connection for bilateral breast cancer. The Court should similarly not disturb this part of the Board's decision. See *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed.Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)).

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Army from April 1995 to April 1999 and from February 2003 to May 2004. (Record (R.) at 400, 656).

In January 2016, Appellant submitted a claim for posttraumatic stress disorder (PTSD). (R. at 776-779).

In February 2016, Appellant submitted a letter from her psychotherapist Ashley Varner, LCSW-C, MSW, which cited to Appellant's presentation of PTSD symptoms and discussed how these symptoms impacted Appellant's life. (R. at 672).

In May 2016, Appellant submitted another letter from a private examiner. (R. at 515-516). In this letter, Dr. Tanika Lasien Day opined that Appellant suffered from PTSD and had been "dealing with combat-related PTSD all along." (R. at 516).

In June 2016, Appellant underwent a VA PTSD examination. (R. at 450-459). Following this examination, the psychologist opined that although Appellant did not meet the criteria for PTSD, she was suffering from adjustment disorder. (R. at 459). The psychologist further asserted that Appellant's civilian diagnosis of PTSD was incorrect, and that the adjustment disorder diagnosis better explained Appellant's clinical presentation. *Id.*

In July 2016, the Baltimore, Maryland Regional Office (RO) issued a rating decision which, *inter alia*, denied Appellant's claim of entitlement to service connection for PTSD, while granting Appellant entitlement to service connection for adjustment disorder, evaluated at 50% disabling and effective October 7, 2015.¹ (R. at 409-418, 427-437).

¹ The Secretary notes Appellant submitted an application for disability compensation for photo dermatitis, received on October 7, 2015. (R. at 789-792).

Appellant submitted a notice of disagreement on November 29, 2016. (R. at 379-388).

In March 2017, the RO issued a statement of the case, continuing Appellant's 50% rating for adjustment disorder and denying his request for an increased evaluation. (R. at 327-360).

In April 2017, Appellant submitted a VA Form 9, appealing the July 2016 RO decision to the Board. (R. at 322-323).

The appeal was added to the Board's docket in August 2017. (R. at 313).

On January 31, 2019, the Board issued a decision denying Appellant's claim for entitlement to a rating in excess of 50% for adjustment disorder. (R. at 5-18). Appellant now challenges that decision.

III. SUMMARY OF THE ARGUMENT

The Board provided an adequate statement of reasons or bases for denying Appellant's claim for an increased rating. In its decision, the Board considered Appellant's various symptoms in a holistic manner and considered Appellant's overall disability picture. The Board's analysis also considered both VA and private treatment records, and lay statements, finding all of this evidence to be competent and credible.

Similarly, the June 2016 VA examination was adequate, as it relied on correct facts and offered a thorough, well-reasoned opinion. Appellant argues against the contemporaneousness of this examination; however, she fails to show—or even argue—that her condition has materially changed. Without

evidence of such, the Board was under no obligation to provide a new examination, and its reliance on the June 2016 VA examination was not clearly erroneous.

Based on the foregoing, the Court should affirm the Board's January 31, 2019, decision in all respects.

IV. ARGUMENT

A. The Board Provided an Adequate Statement of Reasons or Bases for its Decision to Deny Appellant's Claim for an Increased Rating.

The Board's statement of reasons or bases was adequate, because it considered both private and VA treatment records, along with lay statements, in reaching its decision. The Board decision also offered a holistic analysis of Appellant's adjustment disorder, and considered her various symptoms in reaching its conclusion.

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). The Board, however, need not comment upon every piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir. 2007).

Even where the Board fails to provide an adequate statement of reasons or bases, remand is appropriate only if the inadequacy is preclusive of judicial review. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (holding that where judicial review is not hindered by deficiency of reasons or bases, a remand would be of no benefit to the appellant and would thus serve no useful purpose).

Section 4.130 sets forth the general rating formula for mental disorders. For a 100% disability rating, the formula includes:

Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; 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.

38 C.F.R. § 4.130 (2018). For a 70% disability rating, the formula includes:

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 worklike setting); inability to establish and maintain effective relationships.

38 C.F.R. § 4.130 (2018). For a 50% disability rating, the formula includes:

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 (2018). For a 30% disability rating, the formula includes:

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 (2018).

The factors specified in Diagnostic Code (DC) 9440 (Chronic Adjustment Disorder) are not requirements for a particular rating; rather, they are examples of conditions that would warrant a specific rating assignment. See *Mauerhan v. Principi*, 16 Vet.App. 436, 441 (2002). In assigning a rating, the Board must assign the rating that most accurately describes the claimant's overall picture. See *Mauerhan*, 16 Vet.App. at 442-443; 38 C.F.R. § 4.130, DC 9440 (2018). Moreover, the Board must "engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder." *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

Here, the Board provided an adequate statement of reasons or bases by providing a holistic analysis of the facts, which considered Appellant's "overall picture." See *Bankhead*, 29 Vet.App. at 22. Specifically, the Board, after considering VA treatment and examination notes, along with private treatment notes, found Appellant's symptoms most nearly approximated a 50% rating under

DC 9440. (R. at 15). In making this determination, the Board found Appellant's private treatment opinions and lay statements credible and competent, while also citing to a VA examination from June 2016. (R. at 15-16) ("The Veteran's VA treatment records and lay statements of record largely confirm the above-discussed symptoms.").

The Board's decision further considered Appellant's entire disability picture, by discussing the symptoms she exhibited and those which she did not. (R. at 15-16). In fact, the Board noted that the social and occupational impairment caused by Appellant's adjustment disorder did not even rise to the 50% rating at which she was granted, evidencing adherence to the holistic analysis prescribed by *Bankhead*. 29 Vet.App. at 22. Therefore, as indicated by the foregoing, the Board *did* offer an adequate statement of reasons or bases and engaged in the appropriate analysis.

Appellant contends that the Board provided an inadequate statement of reasons or bases because it failed to discuss certain evidence that, in her view, could be construed to support the assignment of a higher evaluation. This does not establish a proper basis to remand her claim, because she fails to show how the omission of such explicit discussion undermines the plausibility of the Board's findings or prohibits judicial review of the same. Appellant argues that the Board failed to address favorable lay statements, which tended to show the presence of certain symptoms highlighted by Appellant's attorney. (Appellant's Brief (App.) at 2-4). Specifically, Appellant asserts that the Board did not address evidence from

Appellant's private physician, social worker, sister, and ex-husband. (App. at 2-4). This is an incorrect assertion, as the Board expressly considered the statements from Appellant's private physician ("Dr. T.D.") and her private social worker ("A.O."). (R. at 15).

Moreover, the Board stated that the "lay statements of record largely confirm" Appellant's symptoms.² (R. at 15). Thus, contrary to Appellant's assertions, the Board *did* consider this favorable evidence. While the Board cannot dismiss favorable evidence without first addressing it, Appellant may not secure a remand without at least showing that the Board's failure to discuss that favorable evidence prejudiced the Court's ability to conduct effective judicial review of the issues raised on appeal. Appellant has not demonstrated as much, and any deficiency in the Board's discussion is, therefore, at most, harmless and non-prejudicial. Whether the Board could have viewed or weighed the evidence differently to reach a different disposition is irrelevant. *Gilbert*, 1 Vet.App. at 52.

Accordingly, the Court should find that Appellant has not met her burden to show the Board's decision inhibits effective judicial review, and further, that the Board provided an adequate statement of reasons or bases for denying Appellant entitlement to an increased initial rating. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table) (appellant

² The Secretary respectfully notes that the Board need not comment on every piece of favorable evidence. *Newhouse*, 497 F.3d at 1302. Furthermore, this notation indicates Board consideration of the lay statements offered by Appellant's sister and ex-husband, as they were in the record.

bears the burden of demonstrating error); *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 June 2016 VA Examination was Adequate.

The June 2016 VA examination relied on correct facts and sound medical reasoning, and thus is adequate. Although this examination was provided in June 2016, there has been no evidence of a material change in Appellant’s symptoms and a new examination was not required.

An adequate medical examination is one that is based on a consideration of the veteran’s prior medical history and describes the veteran’s condition with a level of detail sufficient to allow the Board to make a fully informed decision. *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 also 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) (holding that “a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor’s opinion”).

Generally, an adequate examination “must rest on correct facts and reasoned medical judgment so as to inform the Board on a medical question and facilitate the Board’s consideration and weighing of the report against any contrary reports.” *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

VA regulations specifically require a new medical examination in instances where VA determines there is a need to verify the current severity of a disability. 38 C.F.R. § 3.327(a) (2018). When assessing the current severity of a disability, the Board must offer a new examination if “evidence indicates there has been a material change in a disability or that the current rating may be incorrect.” *Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994) (*citing* 38 C.F.R. § 3.327(a)).

Whether a medical opinion is adequate is a finding of fact subject to review under the “clearly erroneous” standard. *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *D’Aries v. Peak*, 22 Vet.App. 97, 104 (2008). 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 57 (emphasis added); *see also Anderson v. 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.”).

Here, the June 2016 VA examination is adequate, as it is based on a consideration of Appellant’s prior medical history and describes her condition with a level of detail sufficient to allow the Board to make a fully informed decision. (R. at 450-459). Specifically, the June 2016 examiner provided a detailed medical history, thorough behavioral observations, and a well-reasoned opinion. (R. at 451-452, 454-456, 458-459). Appellant does not argue that the substance or form

of the June 2016 VA examination is inadequate. Rather, the only issue Appellant raises in regard to the VA examination is recency. (App. at 4-5).

Appellant cites to *Caffrey v. Brown*, arguing that the June 2016 VA examination does not reflect the current severity of Appellant's condition. *Id.* In *Caffrey*, the Court found that because the claimant's "condition was previously service connected and rated, and the claimant subsequently asserted that a higher rating was justified due to an increase in severity since the original rating," that a new examination was warranted based on this claim of an increase in severity in symptoms. 6 Vet.App. at 381. Unlike in *Caffrey*, here, Appellant did not seek an increased rating due to an increased severity in her condition—she merely asserted general entitlement to an increased evaluation. See (R. at 309-310, 379-380).

More importantly, there is *no evidence* in the record indicating an increase in the severity of Appellant's condition.³ In fact, Appellant did not raise the issue of contemporaneousness until her claim entered the Court's docket, and even now, she does not argue that her condition worsened; rather, she argues that the 2016 VA examination does not "reflect the current severity" of her condition. (App. at 5). As *Caffrey* and its progeny illustrate, for the Court to require a new examination,

³ The Secretary notes that a November 2017 letter from Appellant's counsel takes issue with the substance of the June 2016 VA examiner's discussion. (R. at 309). This letter, however, does not show that Appellant's condition became more severe. Rather, it merely argues against the evidence considered and discussed by the VA examiner.

there must be evidence of a *material change* in the claimant's disability. Appellant has not shown any such evidence.

Accordingly, this Court should find that the June 2016 VA examination was adequate, and further, that Appellant has not shown that the Board's reliance on this examination was 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 Her 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, Appellee respectfully submits that the January 31, 2019, Board decision should be affirmed.

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