Vet.App. No. 19-0581

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

RICHARD A. HARRINGTON,
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

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I. ISSUE PRESENTED

Whether the Court should affirm the December 6, 2018, Board of Veterans' Appeals (Board) decision, which denied a claim of entitlement to an increased initial rating, in excess of 30%, for service-connected posttraumatic stress disorder (PTSD) and denied entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU).

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, Richard A. Harrington, appeals from a December 6, 2018, decision of the Board that denied entitlement to an increased initial rating, in excess of 30%, for PTSD and denied entitlement to TDIU.

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Marine Corps from November 1968 through November 1971. (Record (R.) at 1659).

On March 14, 2012, Appellant submitted a claim of entitlement to service connection for, *inter alia*, PTSD. (R. at 1507).

In an August 2012 rating decision, the Hartford Regional Office (RO) denied Appellant's claim of entitlement to PTSD. (R. at 1341-1347, 1358-1364). Following this decision, Appellant underwent PTSD examinations in October 2012 and November 2012. (R. at 1327, 228-253). Both examinations indicated that Appellant suffered from PTSD. *Id*.

Appellant began consistently receiving mental health treatment in 2013, and continued to do so throughout the appeal period. (R. at 205-208, 185-188, 126-129, 80-83, 71-76, 67-70, 27-30). Treatment notes from 2013 indicate that Appellant was "keeping himself busy with several household projects, to include starting a garden and visiting his friend in Pennsylvania to help with his vineyard." (R. at 8, 185-188). This work included managing the vineyard, maintaining the

vines, and maintaining the vineyard's equipment. (R. at 51-52, 58-59, 67, 80-81, 185-186, 205-206).

In a March 2013 decision, the RO granted Appellant entitlement to service connection for PTSD, evaluated at 30% disabling, and effective March 14, 2012. (R. at 1250-1262). Appellant submitted a timely notice of disagreement in October 2013. (R. at 1240).

The RO issued a statement of the case in January 2014, continuing its decision to maintain Appellant's 30% rating and denying his claim for an increased initial rating. (R. at 1212-1232). Appellant submitted a VA Form 9, appealing the RO's decision, in March 2014. (R. at 1176).

In July 2014, Appellant participated in a Board hearing, during which he testified that his PTSD symptoms had worsened. (R. at 992-1003).

Appellant's increased rating claim was remanded in a June 2015 Board decision, which also inferred a claim for TDIU based upon Appellant's July 2014 hearing. (R. at 985-990). In its remand order, the Board required that Appellant obtain a new PTSD examination. (R. at 987-988).

Appellant underwent this PTSD examination in March 2016. (R. at 46-60). Following this examination, the psychologist opined that Appellant suffered from "[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by medication." (R. at 48). The examiner further noted that Appellant retired in 2007 due to hearing issues,

and despite leaving a part-time job due to long hours and unpredictability, he was nonetheless enjoying his time spent volunteering at his friend's vineyard in Pennsylvania. (R. at 59).

In February 2017, the RO issued a supplemental statement of the case, which again continued Appellant's 30% rating for PTSD and denied entitlement to an increased rating and TDIU. (R. at 669-679).

On December 6, 2018, the Board issued a decision that denied Appellant's claim for an increased initial rating, in excess of 30% for PTSD and denied his claim for TDIU. (R. at 4-14). In its decision, the Board relied upon a variety of mental health treatment notes, which documented Appellant's conditions and symptoms from 2013 through 2018. (R. at 205-208, 185-188, 126-129, 80-83, 71-76, 67-70, 27-30). Appellant now challenges that decision.

III. SUMMARY OF THE ARGUMENT

The Board appropriately applied *Vazquez-Claudio* in its decision to deny Appellant's claim of entitlement to an increased rating for his service-connected PTSD. Its application, analysis, and subsequent conclusion meets the reasons or bases standard. The multitude of arguments raised against the Board's analysis and statement of reasons or bases provide no evidence that the Board failed to comply with *Vazquez-Claudio* nor that its rating decision was clearly erroneous.

Similarly, despite Appellant's arguments to the contrary, the Board did explain the standard for its rating determination—articulated in 38 C.F.R. § 4.130—and applied that standard properly. The Federal Circuit's decision in *Vazquez-*

Claudio, along with precedential decisions from this Court, provide guidance to the Board when it applies the standard in § 4.130.

Additionally, the Board was not required to consider staged ratings in Appellant's case, and therefore did not commit remandable error.

Lastly, the Board appropriately determined that Appellant was not entitled to TDIU and offered an adequate statement of reasons or bases for its decision. The Board considered the necessary factors for "substantially gainful" employment, and despite issuing its decision prior to *Ray*, it nonetheless complied with that decision. Appellant's arguments against the Board's decision and statement of reasons or bases fail to provide persuasive evidence that that Board's decision was clearly erroneous or that its reasons or bases are inadequate.

Accordingly, the Court should affirm the Board's decision.

IV. ARGUMENT

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of fact is clearly erroneous when the Court, after reviewing all the evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Indeed, 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.,* 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.").

As with any finding on an issue of material fact or law, the Board must support its assignment of a disability evaluation with a statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court. 38 U.S.C. § 7104(d)(1) (2018); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence 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).

A. The Board Properly Applied *Vazquez-Claudio* and Provided an Adequate Statement of Reasons or Bases.

In its decision, the Board appropriately considered the severity, frequency, and duration of Appellant's symptoms, and further, it analyzed whether these symptoms caused the level of occupational and social impairment requisite with a higher rating. In short, the Board's decision comports with *Vazquez-Claudio* and provides an adequate statement of reasons or bases.

a. The Board's Vazquez-Claudio Analysis is Not Problematic.

When determining the appropriate rating for PTSD, VA is required to measure a claimant's symptoms against the rating criteria described in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411, which directs the rating specialist to apply the general rating formula for mental disorders. 38 C.F.R. § 4.130 (2018). Section 4.130 sets forth the general rating formula for mental disorders. 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.

Id. 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).

Id.

Because the symptoms enumerated in § 4.130 are not an exhaustive list, the Court has held that VA must consider "all the evidence of record that bears on occupational and social impairment," and then "assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering." *Mauerhan v. Principi*, 16 Vet.App. 436, 440-441 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017) (requiring VA to "engage in a holistic analysis" of the claimant's symptoms to determine the proper disability rating).

In *Vazquez-Claudio v. Shinseki*, the Federal Circuit explained that evaluations under § 4.130 are "symptom driven," meaning that "symptom[s] should be the fact finder's primary focus when deciding entitlement to a given disability rating" under that regulation. 713 F.3d 112, 116-117 (Fed.Cir. 2013). The Federal Circuit further clarified that, "[a] veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id*. at 117. The symptoms must have caused the requisite level of "occupational and social impairment." *Id.* at 117.

Here, the Board explicitly considered the frequency, severity, and duration of Appellant's mental health symptoms and examined whether his symptoms

caused the level of occupational and social impairment requisite with a higher rating. (R. at 10). Specifically, the Board explained:

> [Appellant's] symptoms are not of the frequency, severity, or duration such that they produce occupational and social impairment with reduced reliability and productivity. Although [Appellant] has endorsed occasional panic attacks in excess of once a week, disturbances of motivation and mood, and some difficulty in establishing and maintaining effective work relationships, the evidence, as a whole, fails to show that [Appellant's] symptoms equate in severity, frequency and duration to occupational and social impairment with reduced reliability and productivity. *See Vazquez-Claudio v. Shinseki*. [Appellant] has maintained effective friendships and family relationships; has enjoyable hobbies, to include gardening and working at his friend's vineyard; and he does not exhibit difficulties with long-term memory, complex tasks, judgment, or thinking. [Appellant] has also consistently denied homicidal or suicidal ideation and there has never been a notation of a neglect of personal appearance and hygiene.

(R. at 10). This analysis was included as additional substantiation to the Board's finding that Appellant's "psychiatric disability has been manifested by symptoms of hypervigilance, exaggerated startle response, decreased concentration, sleep disturbances, social isolation, mild memory loss, and anger." (R. at 10).

Together, these statements illustrate adherence to both the rating schedule and the Court's precedent. 38 C.F.R. § 4.130 (2018); *Vazquez-Claudio*, 713 F.3d at 116-117; *Bankhead*, 29 Vet.App. at 22. In fact, the Board explicitly considered Appellant's symptoms in a holistic manner, considering Appellant's symptoms in their larger scheme of his disability. (R. at 10); *see also Bankhead*, 29 Vet.App. at 22. The Board also unambiguously examined the frequency, severity, and

duration of Appellant's symptoms—concluding that certain symptoms tend to be more frequent and severe than others. *Id*.

Appellant argues that the Board violated *Vazquez-Claudio* because it failed to adequately analyze the frequency, severity, and duration of his panic attacks, motivation and mood disturbances, and ability to establish and maintain effective relationships. (Appellant's Brief (App.) at 12-15). In large part, these arguments amount to a disagreement with the Board's ultimate conclusion that Appellant is not entitled to a higher rating. However, Appellant has not shown that the Board's assignment of the disability rating was "clearly erroneous" and thus, he has not met his burden. *See Johnston*, 10 Vet.App. at 84.

Regarding panic attacks, Appellant asserts—in a general manner—that the Board "made no attempt to analyze whether the severity, frequency, or duration of these symptoms, in conjunction with the Veteran's other symptoms, warranted a rating in excess of 30 percent." (App. at 13). As demonstrated above, however, this is simply incorrect. The Board did engage in such a holistic analysis, considering the severity, frequency, and duration of his panic attack symptoms. (R. at 10).

Appellant's assertion that the Board "failed to analyze the severity, frequency, and duration of the Veteran's motivation and mood disturbances" is similarly incorrect, as the Board did in engage in such an analysis. (App. at 13-14); (R. at 10). Appellant's argument regarding these symptoms purports to have the Court re-weigh his case for an increased rating, rather than showing that the

Board violated *Vazquez-Claudio*'s mandate or that the Board's rating decision was clearly erroneous. (App. at 13-14); *see Johnston*, 10 Vet.App. at 84; *see also Anderson*, 470 U.S. at 574. This is task is outside of the Court's power. *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to evidence).

Moreover, the Board *did* consider Appellant's disturbances of motivation and mood, and weighed their severity, frequency, and duration, and again, it is *not* the Court's duty to re-weigh the evidence. (R. at 10) ("Although [Appellant] has endorsed occasional . . . disturbances of motivation and mood . . . the evidence, as a whole, fails to show that the Veteran's symptoms equate in severity, frequency and duration to occupational and social impairment with reduced reliability and productivity."); *Owens*, 7 Vet.App. at 433; *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed.Cir. 2013) ("The Court of Appeals for Veterans Claims . . . may not weigh any evidence itself.").

Likewise, Appellant's argument that the Board "did not adequately consider his difficulties in his relationships with his family" is unpersuasive. (App. at 14). Contrary to this assertion, the Board specifically noted its consideration of Appellant's familial relationships, finding that Appellant "endorsed a positive relationship with his wife, stepson, and grandchildren." (R. at 10). Thus, Appellant is incorrect to assert that the Board "ignor[ed] his difficulty with family and social relationships." (App. at 10). Rather, Appellant, again, is requesting the Court to re-weigh the evidence, which is outside of the Court's duties, and more

importantly, does not prove that the Board's rating determination was clearly erroneous. (App. at 14-15); *Owens*, 7 Vet.App. at 433; *Deloach*, 704 F.3d at 1380; *see Johnston*, 10 Vet.App. at 84; *see also Anderson*, 470 U.S. at 574.

Appellant also argues that the Board failed to adequately consider evidence of his obsessional rituals. (App. at 15-16). This argument fails because rather than demonstrating such an error, Appellant merges the evidence of hypervigilance into purported evidence of obsessional rituals and requests the Court to re-weigh the evidence. (App. at 15) (considering evidence of Appellant's hypervigilance as "daily, obsessional rituals"). As noted above, the Court may not re-weigh the evidence, and Appellant's argument fails to show that the Board's decision was clearly erroneous. *Owens*, 7 Vet.App. at 433; *Deloach*, 704 F.3d at 1380; *see Johnston*, 10 Vet.App. at 84; *Anderson*, 470 U.S. at 574. As such, Appellant has not met his burden and the Court should find this argument unpersuasive.

In the larger context of Appellant's arguments against the adequacy of the Board's *Vazquez-Claudio* analysis, he fails to meet *his* burden to show that the Board failed to consider the severity, frequency, and duration before determining whether his symptoms caused the level of occupational and social impairment requisite with a higher rating. As illustrated by the foregoing, Appellant's arguments intreat the Court to re-weigh the evidence, pushing it away from considering the Board's adherence to law. However, it is the Board's duty to weigh the facts—as it did here—and the Court's duty to consider the law. 38 U.S.C. §

7261 (2018); *see Deloach*, 704 F.3d at 1380 ("The Court . . . must review the Board's weighing of the evidence; it may not weigh any evidence itself.").

Accordingly, this Court should find that the Board conducted an adequate analysis under *Vazquez-Claudio*, and further, that Appellant has not shown that the Board's rating determination was clearly erroneous.

b. The Board's Statement of Reasons or Bases is Adequate.

As noted above, 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*, 1 Vet.App. at 57.

Here, the Board provided an adequate statement of reasons or bases, as it explained the basis of its material findings and conclusions, and more importantly, it analyzed the probative value of the evidence and explained its decisions thereof. (R. at 10). As indicated above, the Board adhered to the law in *Vazquez-Claudio*, which necessarily indicates an adequate statement of reasons or bases. *See* (R. at 8-10, 10). Appellant's arguments to the contrary amount to factual arguments which seek to have the Court re-weigh the evidence of his claim, and further, his arguments are unsupported by law.

Regarding Appellant's purported "difficulties with thinking," Appellant conflates the record to match his argument, while ignoring the Board's analysis. (App. at 16-17). Appellant claims that the Board provided "no analysis of whether [his] persistent inability to concentrate was similar to deficiencies in thinking," despite the Board finding that Appellant experienced decreased concentration.

Compare (App. at 16-17) *with* (R. at 10). Moreover, Appellant contradicts his own argument, pointing out that he was "unable to concentrate *at times*" before asserting that he "persistently" was unable to concentrate. (App. at 16-17) (emphasis added). In short, this is an unpersuasive argument because it attempts to have the Court re-weigh the evidence, which is outside of its responsibilities, and bends the record to match Appellant's argument, failing to show an inadequate statement of reasons or bases. *Owens*, 7 Vet.App. at 433; *Deloach*, 704 F.3d at 1380 ("The Court of Appeals for Veterans Claims . . . must review the Board's weighing of the evidence; it may not weigh any evidence itself.").

Appellant also argues that the Board improperly relied on his participation in hobbies to deny his claim for an increased rating. (App. at 17-18). Appellant hypothesizes that "he could have experienced occupational and social impairment with reduced reliability and productivity because he might have been too disabled to engage in employment while still being able to participate in these hobbies." (App. at 17). In support of this assertion, Appellant relies on 38 C.F.R. § 4.10 and *Amador v. Derwinski*. 2 Vet.App. 499, 501 (1992). Unfortunately, neither § 4.10 nor *Amador* supports Appellant's argument. Although Appellant accurately cites the portion of § 4.10 which states "a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity," his application to the record facts is wanting. *See* 38 C.F.R. § 4.10 (2018). The record indicates that Appellant's work at his friend's vineyard is far more than merely being "up and about and fairly comfortable at home or upon

limited activity," as noted in § 4.10. 38 C.F.R. § 4.10. In fact, Appellant actively assists in managing the vineyard, maintaining the vines, and maintaining the vineyard's equipment. (R. at 51-52, 58-59, 67, 80-81, 185-186, 205-206). Thus, the Board properly considered Appellant's volunteer work, as it is demonstrably more strenuous than being comfortable at home or engaging in limited activity.

Moreover, Appellant's citation to *Amador* provides no legal support, because *Amador* offers no legal precedent applicable to Appellant's argument. In *Amador*, the Court remanded a Board decision because it "failed to discuss or evaluate appellant's complaints of pain, the debilitating effects of the service-connected disability on his daily activities, and his request that 38 C.F.R. § 4.10 (1991) should have been applied to his claim." 2 Vet.App. at 501. Aside from quoting § 4.10 (ostensibly to instruct the Board), the Court made no other reference or application of the regulation. *Id*. at 499-502. In other words, *Amador* provided no guidance on the application of § 4.10 to a factual predicate involving a claimant who engages in a work-like hobby. *Id*. Thus, Appellant's citation to *Amador* provides no support for his argument, as it does not address § 4.10 in a manner applicable to this case.

Accordingly, this Court should find that the Board conducted an adequate analysis under *Vazquez-Claudio*, and further, that Appellant has not shown that the Board's rating determination was clearly erroneous. Likewise, the Court should also find that because the Board's *Vazquez-Claudio* analysis was proper, its statement of reasons or bases is adequate.

c. Appellant's Has Not Shown That the Board's Interpretation of Evidence and Rating Decision is Clearly Erroneous.

Factual determinations made by the Board are entitled to deference and reviewed only for clear error. 38 U.S.C. § 7261(a)(4) (2018). Similarly, as noted above, the assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston*, 10 Vet.App. at 84. 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); *United States Gypsum Co.*, 333 U.S. at 395; *see also Anderson*, 470 U.S. at 574.

Appellant's remaining arguments contained within section "I" of his brief dispute the Board's factual findings and rating determination, but do not establish that the Board's decision was clearly erroneous. Appellant argues that his "symptoms did result in reduced reliability and productivity and even deficiencies in most areas," however, this argument amounts to an unambiguous dispute of the Board's rating determination, as the rating formula for a 50% rating includes "[o]ccupational and social impairment with reduced reliability and productivity," and the rating for a 70% rating includes "[o]ccupational and social impairment, with deficiencies in most areas." *Compare* (App. at 18) *with* 38 C.F.R. § 4.130 (2018). Consequently, Appellant must show that there is only one permissible view of the evidence. *See Anderson*, 470 U.S. at 574. Appellant has not met this burden.

Although Appellant points to sundry facts and repeats various factual arguments, he fails to show that the Board's factual interpretation is so impermissible that it has "definitely" committed a mistake. *See United States Gypsum Co.*, 333 U.S. at 395 (1948). Instead of demonstrating error, Appellant simply articulates his own theory of his claim and symptoms. (App. at 18-19). Because Appellant bears the burden in showing the Board's decision was clearly erroneous, and he failed to meet this burden, the Court should find that the Board's rating determination was not issued in error. *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) (on appeal to the Court, the appellant "always bears the burden of persuasion.").

B. The Board Applied the Proper "Standard" and Provided an Adequate Statement of Reasons or Bases in its Application.

In his brief Appellant argues, unpersuasively, that because the Board provided no "clear rule" to be applied to other cases, his due process rights were violated, and the decision must be remanded. (App. at 19-22). In this regard, Appellant theorizes that "there is no standard against which VA adjudicators can assess the facts of [his] case to determine the severity of his occupational and social impairment under 38 C.F.R. § 4.130." (App. at 21). This is an incorrect assertion, because the standard to which VA adjudicators are held when determining a rating for service-connected PTSD *is* § 4.130. Specifically, § 4.130 sets various levels of social and occupational impairment to equate to specific

ratings—a definite standard. 38 C.F.R. § 4.130 (2018). This standard was expounded upon and clarified in *Vazquez-Claudio*, *Mauerhan*, and *Bankhead*.[1]

In *Vazquez-Claudio*, the Federal Circuit explained that evaluations under § 4.130 are "symptom driven," that "symptom[s] should be the fact finder's primary focus," and that the symptoms must have caused the requisite level of "occupational and social impairment." 713 F.3d at 116-117. In addition to *Vazquez-Claudio*, this Court's decisions in *Mauerhan* and *Bankhead* further instruct the Board on the application of the standard in § 4.130. 16 Vet.App. at 440-441; 29 Vet.App. at 22. In other words, there *is* a definitive legal standard for the Board to apply when issuing a rating for service-connected PTSD (§ 4.130), and the Board applied that standard here. Moreover, Appellant *argues in his brief* that the Board failed to apply the standard for analysis as articulated in *Vazquez-Claudio*. (App. at 12-16). Thus, Appellant's argument is internally inconsistent, and both legally incorrect and unpersuasive, because the standard for adjudication was already prescribed in § 4.130 and interpreted by the Federal Circuit (and this Court), and the Board's decision illustrates its explicit contemplation and application thereof. (App. at 19); (R. at 7-11).

[1] The Federal Circuit in *Vazquez-Claudio* specifically noted the creation of an adjudicatory standard in VA's initial rule proposal in 1995. 713 F.3d at 116-117 (*citing* 60 Fed. Reg. 54,825, 54,826 (Oct. 26, 1995); 61 Fed. Reg. 52,695, 52,696-97 (Oct. 8, 1996)). In fact, the Federal Circuit's holding is an interpretation of the standard, instructing the Board on how to measure claimants' levels of social and occupational impairment.

Appellant argues, under *Johnson v. Wilkie*, that the Board was required to "explain the benchmark" it used to differentiate between various levels of impairment. (App. at 20-21); 30 Vet.App. 245, 255 (2018). Unfortunately, Appellant's citation to *Johnson* does not support his argument, because as explained above, there is already a standard (or "benchmark") for the Board to issue rating decisions for service-connected PTSD: § 4.130.

In *Johnson*, the Court set aside and remanded a Board decision, finding the Board's statement of reasons or bases to be inadequate. 30 Vet.App. at 254-255. The Court explained that because "DC 8100 is rife with subjective terms of degree, the standards for which [were] undefined in the Board's discussion or anywhere [else] in the regulatory structure," the Board was required to "disclose the standard under which it [wa]s operating." *Id*. at 255. Unlike in *Johnson* and DC 8100, however, there are no undefined terms of degree in § 4.130. *Compare* 38 C.F.R. § 4.124a, DC 8100 (containing terms of degree such as "very frequent" and "less frequent") *with Vazquez-Claudio*, 713 F.3d at 116-117 (explaining how to adjudicate the various levels of occupational and social impairment).

In fact, the criteria and symptom descriptions articulated within § 4.130 serve as examples for how the level of social and occupational impairment is measured. 38 C.F.R. § 4.130 (2018). As discussed above, the Federal Circuit and this Court have already explained and clarified how these criteria and descriptions are to be weighed and considered. *See, e.g., Vazquez-Claudio*, 713 F.3d at 116-117 (explaining that evaluations under § 4.130 are "symptom driven," and that

"symptom[s] should be the fact finder's primary focus"). Essentially, the more severe the symptoms, the more social and occupational functioning is impaired. The criteria in § 4.130 provide examples of symptoms of social and occupational functioning to consider, and how those symptoms equate to a reduction in functioning to warrant a higher rating. The more perverse the limitation in social and occupational functioning, the higher the rating.

Therefore, as illustrated by the foregoing, the Board did apply the appropriate "standard" from § 4.130 and complied with the Federal Circuit's ruling in *Vazquez-Claudio* by analyzing Appellant's symptoms to formulate the appropriate rating. (R. at 9-11). Consequently, Appellant's call for the establishment of a "standard" like the one ordered by the *Johnson* Court is inappropriate, because there already is an established standard and judiciary guidance on the issue.

Appellant also asserts that the Board "divorced its analysis from the rating criteria," and cites *Dennis v. Nicholson* to support his assertion that the Board merely "consider[ed] the evidence and announce[d] its ultimate conclusion." (App. at 20); 21 Vet.App. 21, 22 (2007). Contrary to this assertion, however, the Board did provide a sufficient discussion and analysis, as established by the Secretary's previous arguments demonstrating that the Board provided adequately considered the frequency, severity and duration of the symptoms exhibited. Moreover, the Board's decision here is far more descriptive and instructive than the Board's decision in *Dennis*.

In *Dennis*, the Court held the Board's statement of reasons or bases insufficient because it "failed to discuss any specific facts or evidence that led to [it's] conclusion." 21 Vet.App. at 22. In so holding, the Court explained that it has long held that where the Board "merely list[s] the evidence before stating a conclusion," it will find that the Board's decision "does not constitute an adequate statement of reasons or bases." *Id*. (internal citations omitted). In contrast to *Dennis*, here the Board did not merely list the evidence before stating a conclusion—it provided a conclusion *and* analysis after discussing the relevant evidence. (R. at 10). Indeed, the Board explained:

> Upon review of the evidence, the Board finds that [Appellant's] service-connected PTSD is appropriately rated at 30 percent rating. Specifically, the evidence demonstrates that his psychiatric disability has been manifested by symptoms of hypervigilance, exaggerated startle response, decreased concentration, sleep disturbances, social isolation, mild memory loss, and anger.
>
> However, a higher rating is not warranted because [Appellant's] symptoms are not of the frequency, severity, or duration such that they produce occupational and social impairment with reduced reliability and productivity. Although [Appellant] has endorsed occasional panic attacks in excess of once a week, disturbances of motivation and mood, and some difficulty in establishing and maintaining effective work relationships, the evidence, as a whole, fails to show that [Appellant's] symptoms equate in severity, frequency and duration to occupational and social impairment with reduced reliability and productivity. . . . [Appellant] has maintained effective friendships and family relationships; has enjoyable hobbies, to include gardening and working at his friend's vineyard; and he does not exhibit difficulties with long-term memory, complex tasks, judgment, or thinking. [Appellant] has also consistently denied homicidal or suicidal ideation and there has never been a notation of a neglect of personal appearance and hygiene.

> Thus, in light of the evidence, the Board finds that the preponderance of the evidence does not support a disability rating in excess of 30 percent.

(R. at 10). This far surpasses the low reasons or bases bar set by *Dennis*, and illustrates that the Board met the standard discussed in *Dennis* and cited by Appellant. *Compare* (R. at 10) *with* 21 Vet.App. at 22 (noting that "the Board failed to discuss any specific facts or evidence that led to that conclusion"). Accordingly, the Court should find that the Board was not required to "set a standard" for its decision, and more importantly, that the Board correctly applied the preestablished standards governing the application of § 4.130 to the facts of this case. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

C. The Board Did Not Need to Consider Staged Ratings, as Appellant is Not Entitled to Staged Ratings.

When an initial rating is issued, separate ratings may be assigned for separate periods of time (known as staged ratings). *Fenderson v. West*, 12 Vet. App. 119, 126 (1999). Staged ratings account "for the possible dynamic nature of a disability while the claim works its way through the adjudication process." *O'Connell v. Nicholson*, 21 Vet. App. 89, 93 (2007). For increased rating claims, staged ratings are appropriate when "the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings." *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007).

Here, the Board's factual findings did not show distinct time periods where Appellant's PTSD exhibited symptoms warranted different ratings, and thus, it was

under no obligation to consider staged ratings. *See Hart*, 21 Vet.App. at 510. Specifically, the Board determined that, after a review of Appellant's mental health history from October 2012 through the present, his initial rating of 30% appropriately encompassed and compensated for his PTSD throughout the appeal period. (R. at 8-10). The Board's discussion and analysis demonstrated that during this six-year period, it found no facts that indicated Appellant experienced symptoms warranting different ratings. *See Hart*, 21 Vet.App. at 510.

Appellant argues that staged ratings are appropriate because his symptoms worsened in 2017. (App. at 22). Throughout this argument, Appellant cites to *Morgan v. Wilkie*, a non-precedential decision. *Id*. However, *Morgan* simply does not provide Appellant with the relief he seeks, as *Hart* is the proper authority on this matter. As found by the Board and illustrated in the preceding paragraph, staged ratings are inappropriate in this case.

Appellant also contends that the Board was required to consider, "at a minimum, whether Mr. Harrington was entitled to a higher rating from 2017." (App. at 22). This assertion, however, is not supported by law. Neither of Appellant's citations—the non-precedential holding in *Morgan*, nor 38 C.F.R. § 3.103(a), which discusses procedural due process—supports his argument that the Board was mandated by law to consider staged ratings. Rather, the correct rule of law regarding the use of staged ratings comes from the Court's ruling in *Hart v. Mansfield*. 21 Vet.App. at 510. As discussed above, the *Hart* Court explained that staged ratings are appropriate only when "the factual findings show distinct time

periods where the service-connected disability exhibits symptoms that would warrant different ratings." *Id*. Appellant does not make this assertion, and more importantly, the factual predicate does not demonstrate a need for staged ratings.

Accordingly, the Court should find that the Board did not commit error when it did not consider staged ratings, and further that Appellant has not shown any prejudicial error in this regard. *See Hart*, 21 Vet.App. at 510; *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

D. The Board Properly Considered Appellant's Claim of Entitlement to TDIU and Provided an Adequate Statement of Reasons or Bases.

The Board's TDIU determination, and accompanying analysis, appropriately considered all factors required in making such a decision.

a. The Board's TDIU Analysis and Decision is Not Problematic.

A total disability rating is warranted when, because of service-connected disabilities, a veteran is unable to secure or follow a substantially gainful employment. 38 C.F.R. § 4.16 (2018). A total disability rating may be assigned where the schedular evaluation is less than total, but the disabled veteran is unable to secure or follow a substantially gainful occupation as a result of single service-connected disability ratable at 60 percent or more. 38 C.F.R. § 4.16(a) (2018). A veteran who fails to meet these percentage standards may still qualify for an extraschedular TDIU rating under 38 C.F.R. § 4.16(b), wherein VA will grant TDIU

when the evidence shows that the veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. §§ 3.340, 3.341, 4.16(b) (2018).

A determination as to whether a veteran is able to secure or follow substantially gainful employment is a factual determination subject to review under the deferential "clearly erroneous" standard. *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001); *see Gilbert*, 1 Vet.App. at 52-53 (a factual finding is not clearly erroneous if there is a plausible basis for it in the record); *see also Faust v. West*, 13 Vet.App. 342, 354 (2000) (explaining that a determination as to employability involves "more than simply whether the claimant can or cannot work at all"). The Court must consider the veteran's abilities and employment history when determining whether a veteran is capable of engaging in substantially gainful employment. *Faust*, 13 Vet.App. at 355. Additionally, the Court in *Ray v. Wilkie* explained that:

> [i]n determining whether a veteran can secure and follow a substantially gainful occupation, attention must be given to
>
> • the veteran's history, education, skill, and training;
>
> • whether the veteran has the physical ability (both exertional and nonexertional) to perform the type of activities . . . required by the occupation at issue . . .
>
> • whether the veteran has the mental ability to perform the activities required by the occupation at issue . . .

31 Vet.App. 58, 73 (2019) (internal citations omitted) (emphasis added).

Here, the Board properly determined that Appellant was able to follow a substantially gainful occupation, and offered an adequate statement of reasons or

bases for doing so. (R. at 13). Specifically, the Board found that Appellant left his most recent paying job because "the job was stressful due to it being unorganized and unstructured. Additionally, [Appellant] reported that some people were nice, but that the job drove him crazy, attributing such to the long hours and subpar pay." (R. at 13). The Board also concluded that Appellant is unemployed, but not due to his PTSD or hearing disabilities. (R. at 13). The Board explained this conclusion by noting:

> [Appellant's] treatment records reflect that [he] is currently working at a friend's vineyard, and he did not endorse to any physician that he was prohibited from doing so based on his service-connected disabilities. . . . [Appellant] stated that the position at the vineyard was beneficial, that he enjoyed the work and was comfortable in the setting, and this his psychiatric symptoms improve when he is able to be productive.

(R. at 13). By reasoning that Appellant is unemployed by choice (i.e. not due to his service-connected disabilities) and is physically and mentally capable to work at his friend's vineyard, the Board demonstrated that it considered both the economic and non-economic factors impacting Appellant's ability to follow a substantially gainful occupation. *Compare Ray*, 31 Vet.App. at 73 *with* (R. at 13). Based on the foregoing, the Court should find that the Board properly determined whether Appellant could follow a substantially gainful occupation, adhered to the *Ray,* and provided an adequate statement of reasons or bases for its decision.

Appellant argues that "[n]either [his volunteer work] nor his reason for retirement in 2007" explains whether he is capable of following a substantially gainful occupation, citing to *Ray* for legal support. (App. at 23-24). However, as

demonstrated above, the Board's decision comports with *Ray* because it factored in Appellant's mental and physical abilities and considered both the economic and non-economic factors impacting Appellant's ability to follow a substantially gainful occupation. *Compare Ray*, 31 Vet.App. at 73 *with* (R. at 13). Appellant also points to various facts in an attempt to show that he is unable to follow substantially gainful employment. *See* (App. at 23-25). Yet, none of these facts illustrate that the Board's determination is clearly erroneous because the Board's findings are similarly permissible.

Particularly, Appellant's ability to manage a vineyard and maintain vines and equipment, in light of his retirement (deemed as not being caused by his service-connected disabilities), is highly relevant and probative and demonstrates an undeniably permissible view of the evidence. (R. at 12-14). Thus, the Board did adhere to *Ray* and Appellant has not shown that the Board's determination was clearly erroneous. *Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Appellant also asserts that the Board "erroneously concluded that [he] was capable of substantially gainful employment due to the reasons for his retirement and his volunteer work at a friend's vineyard," and thus remand is required. (App. at 23-28). Within this broad assertion, Appellant points to two main issues that purportedly illustrate Board error. As indicated by the following, these arguments are unpersuasive.

First, Appellant argues that the Board failed to adhere to *Ray*. (App. at 23-24). As previously illustrated, however, the Board *did* consider both the economic and non-economic factors discussed in *Ray*. *Compare Ray*, 31 Vet.App. at 73 *with* (R. at 13). Moreover, the Court in *Ray* explained that the factors it provided did not constitute a "checklist that must be run completely through in every case." 31 Vet.App. at 73. Rather, the Court clarified, "discussion of any factor is *only necessary if the evidence raises it*." *Id*. (emphasis added). Because *Ray* was decided after the Board's decision, it necessarily could not have cited directly to *Ray*. Even so, the Board nonetheless adhered to the *Ray* ruling, because it considered and discussed the factors raised by the evidence. (R. at 11-12).

Second, Appellant asserts that the Board erred in relying on the March 2016 VA examination, citing to *Cathell v. Brown* and *Gleicher v. Derwinski* for legal support. (App. at 27); 8 Vet.App. 539, 544 (1996); 2 Vet.App. 26, 28 (1991). However, neither of these cases support Appellant's assertion.

In *Gleicher*, the Court stated that "merely allud[ing] to educational and occupational history, attempting in no way to relate these factors to the disabilities of the appellant, and conclude[ing] that some form of employment is available," will result in an inadequate statement of reasons or bases. 2 Vet.App. at 28. Similarly, in *Cathell*, the Court remanded a Board decision because it contained a bare conclusory statement that the claimant was employable, without providing any significant analysis of his specific circumstances or acknowledging that two physicians concluded that his disability would make working difficult. 8 Vet.App.

at 544. Unlike both of these cases, however, here the Board explained the applicable law, provided a summary and assessed the probative value of many of Appellant's medical records, before concluding that the evidence—in its entirety—indicated that he was not unemployable due to his service-connected disabilities. C*ompare Wingo v. Shulkin*, 2017 U.S. App. Vet. Claims LEXIS 1630 *with* (R. at 11-13).

Accordingly, the Court should find that the Board properly considered the multiple factors bearing on Appellant's employability, provided an adequate statement of reasons or bases for denying Appellant's claim of entitlement to TDIU, and most importantly, that Appellant has not met his burden to show that the Board's determinations were clearly erroneous. *Berger*, 10 Vet.App. at 169 (on appeal to the Court, the appellant "always bears the burden of persuasion.").

b. Appellant's Remaining Arguments are Unpersuasive.

Appellant lastly argues that "[his] entitlement to TDIU is inextricably intertwined with the issue of his entitlement to a higher rating for his PTSD and vice versa." (App. at 29-30). This argument is moot. As illustrated by the foregoing, the Court should affirm the Board's decision, finding that Appellant has not met his burden of showing that the Board erred in denying entitlement to an increased rating nor has he met his burden of showing that the Board erred in denying entitlement to TDIU. *See Sanders*, 556 U.S. at 409; *Berger*, 10 Vet.App. at 169. Moreover, contrary to Appellant's arguments, he has not established that the Board denied his claim simply due to the lack of a VA Form 21-8940. Rather,

as addressed above, the Board analyzed Appellant's abilities and employment history in deciding TDIU. Accordingly, the Court should also find Appellant's final argument to be moot.

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

Issues or arguments not raised on appeal are abandoned. *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, 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 6, 2018, Board decision should be affirmed in all respects.

Respectfully submitted,

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