IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 18-7385

ALBERT JENKINS,

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

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v.	)	Vet. App. No. 18-7385
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Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Whether the Board of Appeals for Veterans' Claims (Board) provided adequate reasons or bases for its November 28, 2018, decision to deny entitlement to a disability rating higher than 30% for generalized anxiety disorder (GAD) and entitlement to a total disability rating based on individual unemployability (TDIU).

STATEMENT OF THE CASE

A. Jurisdictional Statement

The U.S. Court of Veterans Appeals for Veterans Claims has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Appellant, Albert Jenkins, appeals the November 28, 2018, Board decision

that denied entitlement to a disability rating higher than 30% for GAD and entitlement to a TDIU. [Record Before the Agency (R.) at 4-35].

C. Statement of Facts

Appellant served in the United States Army from May 1966 to April 1968. [R. at 3317-18]; [R. at 853].

Appellant was granted entitlement to service connection for GAD, effective March 11, 1995, at a 30% evaluation. [R. at 3251-52]. In October 2006, Appellant submitted a claim requesting an increased rating. [R. at 2550].

In January 2007, Appellant underwent a Compensation and Pension (C&P) examination. [R. at 2502-06]. The examiner noted that Appellant worked at the Department of Motor Vehicles (DMV) for the last ten years and was in good standing at his job. [R. at 2502]. Appellant reported that "he plans to continue working until age 65 when his wife will be age 62 and the two of them can retire with full benefits," and the examiner found no evidence of occupational impairment. [R. at 2502-03]. As a result of his examination and review of the records, the examiner concluded that

> By [Appellant]'s report as well as records it would appear that his anxiety is less disabling now than it has been at times in the past. He is actually coping quite well. There is no significant impairment in occupational or social functioning. He is slightly impaired in his overall functioning with a history of sleep disturbance and episodes of anxiety.

[R. at 2506].

In July 2007, the Department of Veterans Affairs (VA) regional office (RO)

issued a decision continuing Appellant's 30% rating. [R. at 2490-96]; [R. at 2466-68]. Appellant submitted a notice of disagreement (NOD) the following month, [R. at 2460], and, in February 2008, the RO issued a Statement of the Case (SOC), continuing the 30% evaluation, [R. at 2420-30]; [R. at 2442-49]. In March 2008, Appellant submitted a substantive appeal. [R. at 2418-19]. Numerous Supplemental Statements of the Case (SSOCs) were issued following the addition of new evidence. [R. at 2360-66] (January 2009, SSOC); [R. at 2345-49] (July 2009, SSOC), [R. at 2308-12] (January 2010, SSOC); [R. at 2194-98] (March 2011, SSOC).

Appellant's personnel records from the DMV document that, between the years of 2000 and 2009, he had five documented leave related issues, [R. at 2387]; [R. at 2800]; [R. at 2801]; [R. at 2803]; [R. at 2804]; one documented instance of inappropriate remarks to a supervisor, [R. at 2802]; and one documented work performance issue, [R. at 2784]. Appellant met with a counselor from Northeast Career Planning during his time at the DMV. [R. at 1018]. The employment counselor noted Appellant's primary disability was a back injury and his secondary disability was anxiety disorder and noted that his limitations were to avoid lifting over 20 pounds, bending, squatting, pushing, or pulling. [R. at 1013 (1013-14)]; *see* [R. at 2774 (2773-77)]; [R. at 2779 (2778-82)]. In April 2009, the employment counselor noted that Appellant experienced "continued success with his new position as the mailroom assistant at Motor Vehicle. Albert has been doing so well

that he now splits his time between the mailroom and on the floor batching." [R. at 2779].

Appellant was afforded another C&P examination in December 2010. [R. at 2206-09]. During the examination, Appellant stated that his relationships with his wife, three adult children, four grandchildren, and his five living siblings were all good. [R. at 2208]. He also stated that he had a few friends, including one good friend, and that he socialized frequently. *Id.* Appellant also said that he previously retired from the DMV because he was eligible due to age or duration of work and "that he performed well at his job, but had occasional problems with a 'difficult supervisor.'" *Id.* Appellant endorsed symptoms of worry and sleep impairment, and stated that he sometimes experienced verbal anger and intermittent thoughts of harming others. [R. at 2206-07]. However, he denied both grossly inappropriate behavior and episodes of violence, and the examiner found he had good impulse control. *Id.* Appellant also denied suicidal thoughts, and the examiner documented normal thought content and process, appropriate affect, and a neatly groomed general appearance. *Id.*

In January 2012, the Board issued a decision denying entitlement to an evaluation in excess of 30% for Appellant's GAD and remanding the issue of TDIU for the RO to adjudicate the issue in the first instance. [R. at 2036-56]. The GAD claim was appealed to this Court, and the claim was remanded pursuant to a joint motion for partial remand (JMPR). [R. at 2060-67] (JMPR); [R. at 2059] (Court

order). In January 2013, the Board remanded the GAD claim to schedule a Board hearing. [R. at 1974-77].

In April 2015, Appellant submitted a Veteran's Application for Increased Compensation Based on Unemployability. [R. at 1437-38]. He stated that he worked at the DMV from 1997 to 2009 and that he became too disabled to work due to all his service-connected disabilities in 2009. [R. at 1437]. In addition to his GAD, Appellant is also service connected for dyshidrotic eczema of the palms of the hands and chalazion, left lower eyelid. [R. at 761].

A Board hearing was conducted in May 2015, during which both Appellant and his wife testified. [R. at 1352-88]. During the hearing, Appellant's wife testified that they had periods of marital trouble but that they had also gone on a cruise together. [R. at 1381-82].

The Board issued a decision in September 2015 on Appellant's increased rating claim, [R. at 1289-1306], which was vacated by an April 2016 Joint Motion for Remand (JMR), [R. at 1267-72] (JMR); [R. at 1273] (Court Order).

Appellant submitted vocational assessments dated May 2015, [R. at 1037-43], and July 2016, [R. at 1028-34]. During the 2015 vocational assessment, Appellant reported that "he always did well on his performance reviews, except that he would get negative remarks regarding mistakes." [R. at 1040].

In December 2016, the Board issued a decision, denying entitlement to an evaluation in excess of 30% for Appellant's GAD. [R. at 858-76]. The RO issued a rating decision and a SSOC with regard to the issue of TDIU in April 2017. [R.

at 739-56] (SSOC); [R. at 758-62] (rating decision). In August 2017, the Board issued a decision denying entitlement to TDIU. [R. at 280-93]. In April 2018, the Court issued a memorandum decision, which remanded Appellant's increased rating claim for GAD for the Board to articulate the standard under which it determined symptoms of occupational and social deficiency demonstrate a 30%, 50%, or 70% rating. [R. at 248 (244-49)]; [R. at 253 (250-53)] (docket). In May 2018, the Court remanded the issue of TDIU pursuant to a JMR. [R. at 100-06] (JMR); [R. at 93] (Court Order). The JMR instructed the Board to consider evidence contained in the 2015 and 2016 vocational opinions indicating that Appellant received a demotion of job responsibility during his employment at the DMV and evidence that may have demonstrated increased impairment towards the end of his employment. [R. at 102-03].

On November 28, 2018, the Board issued a decision denying entitlement to a disability rating higher than 30% for GAD and entitlement to TDIU. [R. at 4-35]. The Board articulated the standard under which it determined whether Appellant's symptoms demonstrated a 30%, 50%, or 70% rating and found that, while Appellant demonstrated some symptoms that are indicative of a higher rating, Appellant's symptoms and impairment most closely approximated a 30% rating. [R. at 7-23]. The Board also found that, while Appellant experienced some occupational impairment due to his GAD, his symptoms were not severe enough that he was not able to obtain and secure substantially gainful employment. [R. at 31-35]. The Board found no indication that Appellant's GAD caused Appellant's

change in duties or that Appellant experienced worsening symptoms that led to his retirement. [R. at 33-34]. The Board further found that Appellant's other service-connected disabilities did not render him unable to obtain or secure substantially gainful employment. [R. at 34].

SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate either error or prejudice in the Board's decision so neither remand nor reversal is warranted. The Board provided adequate reasons or bases for finding a rating in excess of 30% for GAD and entitlement to TDIU not warranted. Appellant fails to demonstrate any evidence the Board did not consider, any findings inadequately explained, or any law improperly applied. His arguments amount to a disagreement with the Board's decision. The Board's findings are not clearly erroneous and should be upheld.

ARGUMENT

I. The Board provided adequate reasons or bases for finding a rating in excess of 30% not warranted for Appellant's GAD

The provided adequate reasons or bases for determining a rating in excess of 30% for GAD was not warranted. When deciding an appellant's claim, the Board is obligated to provide a written statement of the reasons or bases for its findings and conclusions. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). "To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the

claimant." *McDowell v. Shinseki*, 23 Vet.App. 207, 215-16 (2009). To do this, the Board must simply provide sufficient discussion to enable both the claimant and this Court to understand the basis of its decision and permit judicial review of the same. *Gilbert*, 1 Vet.App. at 57. The rating criteria for GAD permits the assignment of a 30% disability rating where the evidence of record shows the claimant's level of disability more nearly approximates:

> 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. A 50% disability rating is available where the evidence shows:

> 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. A 70% disability rating is available where the evidence shows:

> Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure,

> or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

38 C.F.R. § 4.130. Appellant may only qualify for a given disability rating under 38 C.F.R. § 4.130 "by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration" that cause the degree of occupational and social impairment enumerated in the regulation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117-18 (Fed. Cir. 2013). Where there is a question as to which of two evaluations shall be applied, the evaluation with the criteria that more nearly approximates Appellant's disability picture will be assigned. 38 C.F.R. § 4.7. A determination by the Board as to the proper evaluation of a disability is a factual determination subject to review under the clearly erroneous standard. *Pierce v. Shinseki*, 18 Vet.App. 440, 443 (2004). Under this deferential standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52-53.

Here, the Board concluded that Appellant's disability profile most closely approximated the criteria associated with a 30% rating. [R. at 18]. The Board found probative the VA mental health visits of records as well as the C&P examinations, "particularly to the extent they were supported by [Appellant]'s

statements and the VA mental health records." [R. at 18]. The Board described Appellant's symptomology as including the following:

> Generally satisfactory functioning; normal thought content and processes; intact judgment; appropriate affect and appearance; unremarkable psychomotor activity; chronic sleep impairment; alcohol addiction that is in remission; irritability; angry outbursts; difficulty adapting to stressful circumstances, like dealing with a supervisor, work guidelines, or crowds; and generally positive social relationships, with some difficulty establishing and maintaining work relationships.

Id. The Board acknowledged that Appellant experienced some symptoms indicative of a higher rating, specifically difficulty adapting to stressful circumstances and some difficulty establishing and maintaining social and work relationships, but found that "the majority of [Appellant]'s symptoms, and the severity, frequency, and duration of all of his symptoms when viewed holistically, justify a 30[%] rating only." [R. at 18-19], *see also* [R. at 21] (discussing Appellant's difficulty with establishing and maintaining effective work and social relationships but finding the severity, frequency, and duration of which not sufficient, when combined with his overall symptomatology, to warrant a rating in excess of 30%). The Board also considered his occupational and social impairment more generally and found that, while Appellant demonstrated some level of impairment in both areas, it was best approximated by a 30% rating. [R. at 19-21]. The Board's findings and conclusions were understandable, plausible, and should be upheld. *See Gilbert*, 1 Vet.App. at 52.

Appellant argues that the Board did not properly consider his occupational

impairment, but his argument amounts to a disagreement with the Board's weighing of the evidence. *See* App. Br. at 10-11. As an initial matter, Appellant mischaracterizes the Board's analysis as merely relying on the fact that Appellant was employed and not requiring continual assistance or multiple reprimands. *See* App. Br. at 10. The Board explained that Appellant received seven documented personnel actions in 12 years and that Appellant met with an employment counselor monthly or less, but it found the "[t]he number and timing of both his counselor meetings and the personnel actions shows they were infrequent and discrete in nature, and had only an acute - as opposed to residual or lasting impact - on his work." [R. at 19]; *see* [R. at 1040] (reflecting Appellant's statement that he visited an employment counselor once every one to two months). The Board further found probative Appellant's statements that he had no difficulty arriving to work on time and generally had positive performance reviews as well as there only being a single documented personnel action for work performance contrary to finding the reduced reliability or productivity needed to warrant a higher rating. [R. at 20-21]; *see* [R. at 1040] (reflecting Appellant's statement that he had no difficulty being on time for work and generally performed well on performance reviews); *see also* [R. at 2208] (reflecting Appellant's statement that he "performed well at his job, but had occasional problems with a 'difficult supervisor'"). The Board concluded based on this evidence that at work Appellant "generally functioned satisfactorily but had decreases in work efficiency and periods of inability to perform his occupational tasks that occurred at irregular and infrequent intervals."

[R. at 19-20]. Thus, while the Board required symptoms more generalized and continuous in nature (in line with its interpretation of the 50% criteria, which is discussed further later in this brief) than the irregular and infrequent symptoms Appellant manifested, it did not require that such symptoms be continuous.

While Appellant argues that formal reprimands and being out of work are not the only ways to demonstrate that a higher rating is warranted, Appellant fails to point to anywhere that the Board requires such evidence to warrant a higher rating. *See* App. Br. at 10-11. As discussed above, the Board analyzed at length Appellant's symptomatology throughout all aspects of his life, as reflected in medical records, Appellant's statements, and other documentation of record, and it found that his impairment best approximated a 30% rating. *See* [R. at 7-23]. In reference to occupational impairment specifically, the Board explicitly considered, and found probative, Appellant's lay statements and counselor meetings on this issue. *See* [R. at 19-21]. It is Appellant's burden to demonstrate error on appeal, and he fails to do so here. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), ***aff'd*** 232 F.3d 908 (Fed. Cir. 2000); *see also Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (stating the appellant bears the burden of demonstrating error on appeal).

Appellant takes issue with the factual findings of the Board based on various evidence but fails to demonstrate that the Board's findings were clearly erroneous. *See* App. Br. at 11-20. Factual findings may be derived from credibility determinations, physical or documentary evidence, or inferences drawn from other

facts. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). To the extent Appellant demonstrates reasons that the evidence could be interpreted differently, he fails to demonstrate that the Board's findings were not plausible. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* For instance, while Appellant claims that meeting with an employment counselor monthly should not demonstrate infrequent work deficiencies, he fails to demonstrate that the evidence can only plausibly be interpreted in that manner. App. Br. at 11. In another example, Appellant argues that written warnings were often for repeated behavior and that this should be indicative of a higher rating. App. Br. at 12-13. However, again Appellant fails to demonstrate that the evidence can only plausibly be interpreted as leading to that finding. *See id.* While Appellant attempts to advance a counternarrative, he fails to demonstrate error. *See Anderson*, 470 U.S. at 574.

Appellant also fails to demonstrate that there is any evidence that the Board did not consider or any findings that were inadequately supported. *See* App. Br. at 11-20. The Board's statement of reasons or bases "generally should be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate." *Johnson v. Shinseki*, 26 Vet.App. 237 (2013) (en banc) (citations omitted), *reversed on other grounds sub nom Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). The Board is presumed to have considered all of the

evidence of record "absent specific evidence indicating otherwise," *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and, where it is silent as to a specific piece of evidence, the Court "must presume that the Board considered this evidence and found it too scant to warrant comment," *Robinson v. Peake*, 21 Vet.App. 545, 555 (2008).

To the extent Appellant argues the Board did not consider that Appellant received biweekly counseling for a time, he fails to demonstrate why he believes the Board did not appropriately consider this evidence. *See* App. Br. at 11. Appellant points to a 1999 letter indicating that Appellant received counseling bi-weekly, [R. at 2985], as well as a 2009 Northeast Career Planning profile that stated that Appellant "desire[d]" bi-weekly counseling sessions, [R. at 2779]. For one, the 1999 letter was generated seven years prior to the filing of Appellant's increased rating claim. *See* [R. at 2985]. Where an increase in the disability rating is at issue, the present level of disability is of primary importance." *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994). While the letter may indicate that Appellant received biweekly counseling sessions for a period of time in 1999, it says nothing about the number of counseling sessions Appellant received during the claims period. *See* [R. at 2985]. Additionally, while Appellant may have desired bi-weekly sessions, [R. at 2779], Appellant himself said that such sessions occurred mostly once a month but sometimes less frequently, [R. at 1040]. Even assuming that such counseling sessions occurred twice a month, Appellant fails to demonstrate how such finding would change the Board's analysis, especially since the Board

found his counseling appointments were primarily related to his non-service-connected back disability. *See* [R. at 28]; *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error).

Appellant's argument that the Board did not adequately consider his statement that he would receive negative marks for mistakes is similarly unpersuasive. *See* App. Br. at 12. For one, the Board explicitly referenced this statement in its opinion. *See* [R. at 15] (referencing [R. at 1040]). Reading the examination as a whole, the Board acknowledged this statement, along with the other evidence of record demonstrating occupational impairment, and found that Appellant committed errors and even received a reprimand regarding such problems but that such problems were only intermittent and not indicative of a rating in excess of 30%. [R. at 15]; [R. at 19-20]. Appellant also tries to dispute the Board's findings by arguing that the Board does not account for Appellant being demoted. *See* App. Br. at 12. However, the Board explicitly found that Appellant's change in job duties was not due to his GAD. [R. at 29]. Appellant, further, argues that he had difficulty getting along with his supervisor but neglects to acknowledge that the Board also explicitly considered this. *See* App. Br. at 12. The Board acknowledged that Appellant had issues with his supervisor, including a reprimand concerning this issue, and specifically found that Appellant demonstrated some difficulty establishing and maintaining effective work relationships but that this impairment was not of the severity, frequency, or duration to warrant a higher

rating. [R. at 21]; *see* [R. at 18] (finding Appellant had "difficulty adapting to stressful circumstances, like dealing with a supervisor, work guidelines, or crowds"); *see also e.g.,* [R. at 10] (discussing evidence pertaining to these difficulties); [R. at 12] (discussing the same). Appellant's arguments amount to a disagreement with the Board's weighing of the evidence, not remandable error.

With respect to social impairment, Appellant misreads the opinion as "essentially" requiring total social impairment to warrant a 50% rating. *See* App. Br. at 11-12. As the Board found probative, Appellant testified that he had good relationships with his three adult children, four grandchildren, and his five living siblings. [R. at 20]; *see e.g.,* [R. at 2208]. While the Board acknowledged that he had occasional periods of marital trouble, it found that Appellant's relationship with his wife was also generally good. [R. at 20]; *see e.g.,* [R. at 2208] (noting good relationship with wife and that he goes to casinos with wife about twice a month). The Board further found probative that Appellant enjoyed some social activities and engaged in activities that interested him. [R. at 20]; *see e.g.*, [R. at 2503] (noting that Appellant enjoyed fishing and had friends); [R. at 2208] (noting he enjoyed gardening; saw one son and grandchild daily and spoke with his other two children, who lived out of town, often; had a few friends, including one good friend; and socialized frequently). The Board accordingly found "such a demonstrated ability to engage social activities, some of which arguably take place in crowds," inconsistent with the social impairment required to warrant a higher rating. [R. at 20]. Contrary to Appellant's assertion, the Board did not find that Appellant needed

to demonstrate an inability to engage in social activities to warrant a 50% rating but that the extent of his demonstrated ability to engage in social activities was not indicative of a 50% or higher rating. *See* [R. at 20]; App. Br. at 11-12. Appellant's arguments that the Board should interpret this evidence differently amounts to a disagreement with the decision and not remandable error. *See* App. Br. at 29.

To the extent Appellant argues that Board rejected his lay statements and relied too heavily on the medical examinations of record, this is unpersuasive. *See* App. Br. at 13. The Board did not reject Appellant's statements in their totality, just the statements contained in the 2015 and 2016 vocational assessments to the extent that they conflicted with more contemporaneous statements. [R. at 22]. The Board is allowed to reject lay statements if they contradict more contemporaneous statements. *See Caluza v. Brown,* 7 Vet.App. 498, 511-12 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (upholding the Board's finding that the claimant's statements 40 years after the alleged event were not credible because they contradicted lay statements more contemporaneous to the alleged event). The Board explained why if found the contemporaneous statements more probative:

> It is possible that with the years that have passed, [Appellant] does not recall exactly what his symptoms were in any given year, so he may not have accurately reported his history to the vocational experts – not through any purpose of deception, but simply due to the passage of time. Therefore, the contemporaneous records are a far more accurate reflection of his symptoms over the more than a decade encompassed by this appeal.

[R. at 22]. While Appellant argues that his more contemporaneous statements do not contradict the lay statements in the vocational opinions, the Board explicitly found otherwise and pointed to numerous instances where they conflict. *Compare* [R. at 15] (referencing the May 2015 vocational evaluation that found him unemployable based on the severity of Appellant's reports of difficulty with his supervisors and assistance received from a career counselor), *with* [R. at 19] (finding "the number and timing of his counselor meetings and the personnel actions shows they were infrequent and discrete in nature"), *and* [R. at 21] (finding the record demonstrates that he had occasional difficulty with his supervisors); *compare* [R. at 16] (referencing the July 2016 vocational evaluation, which found that the December 2010 C&P examiner's assessment was "a tremendous understatement of the veteran's functional difficulties overall and the amount of external support and effort it took to maintain him in what has been described as de facto sheltered employment, ending finally with the menial task of assembling boxes" based in part on Appellant's reports), *with* [R. at 23] (finding the December 2010 C&P examiner's assessment consistent with the mental health treatment records and lay evidence), *and* [R. at 28-29] (finding no evidence that Appellant was demoted or that his job duties were modified due to service-connected conditions). Similarly, Appellant's argument that the Board did not respond to Appellant's argument on this point is unpersuasive. *See* App. Br. at 20-21 (citing [R. at 119 (117-23)]. The Board explicitly referenced Appellant's

October 2018 brief and, reading the Board decision as a whole, addressed the substance of the arguments contained therein, as discussed above. [R. at 23] (noting the Board addressed the arguments in the October 2018 brief); *see e.g.,* [R. at 15-16]; [R. at 19]; [R. at 21]; [R. at 23]; [R. at 28-29].

A. Appellant fails to demonstrate that the Board's standard under which it analyzed his symptoms was improper

Appellant fails to demonstrate that the Board's standard under which it analyzed his symptoms was improper. The Court previously remanded Appellant's increased rating claim for GAD for the Board to articulate the standard under which it determined symptoms of occupational and social deficiency demonstrated a 30%, 50%, or 70% rating. [R. at 248 (244-49)]; [R. at 253 (250-53)] (docket). The Board here complied with this remand instruction by explaining its interpretation of the diagnostic code. *See* [R. at 16-18]; *see also Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (finding that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning," which may appropriately include referring to a dictionary) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Board explained that it was interpreting the regulation based on its plain meaning and described Merriam-Webster Dictionary's definition of "occasional" and "intermittent." [R. at 17]. Based on these definitions, the Board explained that the phrase "occasional decrease in work efficiency" means "decreases in work efficiency that occur at irregular or infrequent intervals" and the phrase "intermittent periods of inability to perform occupational tasks"

means “periods of inability to perform occupational tasks that occur at intervals, as opposed to continuously.” *Id.* Therefore, the Board found that a 30% rating was warranted for “a disability profile where the evidence most approximately shows the veteran is generally functioning satisfactorily with infrequent decreases in work efficiency and periods of inability to perform occupational tasks, which are episodic and discrete exceptions to generally functioning satisfactorily.” *Id.* Since a 50% rating does not include the modifiers occasional or intermittent contained in the 30% rating or other limiting language, the Board found that that a 50% rating reflects a disability profile that “exhibits reduce reliability and productivity that manifests as more generalized and continuous in nature.” [R. at 18]. As the Board concluded the main difference between a 30% and a 50% rating is “whether such instances are generally infrequent in nature such that they are exceptions to the rule of generally functioning satisfactorily, or whether reduced reliability and productivity is the general rule.” *Id.* This explanation is appropriate and complies with the previous remand instructions from the Court. *See Jones v. Shinseki*, 26 Vet.App. 56, 61 (2012) (noting VA regulations are construed in accordance with their plain meaning).

Contrary to Appellant’s assertion, the Board does not require that Appellant be unemployable to warrant a 50% rating. *See* App. Br. at 13-16. As an initial matter, *Ray v. Wilkie*, 31 Vet. App. 58 (2019), did not confirm the propriety of relying on Social Security Administration (SSA) law in the absence of VA interpretations of salient terms as Appellant claims. *See* App. Br. at 15. As the

Court made clear in *Ray*, SSA law was not binding, and the Court only looked to if for "appropriate guidance." 31 Vet. App. at 73 ("To be sure, the Court has previously declined to order VA to adopt Social Security definitions. And, to be clear, we don't adopt Social Security's regulations as VA regulations. To the extent we discuss them, we look to them only for 'appropriate guidance,' as the Court has done before.") (citing *Faust v. West*, 13 Vet. App. 342, 356 (2000) ("Moreover, we find appropriate guidance in -- albeit that we are not bound by -- the definition of "substantially gainful activity" provided in regulations promulgated by [SSA]")). Further, previous caselaw has also made clear that SSA regulations are not determinative for VA claims. *See Beaty v. Brown*, 6 Vet. App. 532, 538 (1994) ("There is no statutory or regulatory authority for the determinative application of SSA regulations to the adjudication of VA claims."). Thus, the Board was not required to discuss SSA regulations here. Further, as the Board explained it was merely requiring reduced reliability and productivity of a more continuous nature to warrant a 50% rating, which is in line with the rating criteria, not being completely unproductive or unreliable as Appellant implies. *See* [R. at 17-18]; App. Br. at 15-16. *see also* 38 C.F.R. § 4.130. To the extent Appellant alleges that reduced reliability and reliability naturally prevents substantially gainful employment, he disagrees with the diagnostic code itself, and again fails to identify error. *See Wanner v. Principi*, 370 F.3d 1124, 1131 (Fed. Cir. 2004) ("The Secretary's discretion over the schedule, including procedures followed and content selected, is insulated from judicial review . . .").

The Board, similarly, adequately explained the difference between a 50% and 70% rating, again relying on the plain meaning of the regulation. *See* [R. at 17-18]. As the Board explained, the difference between a 50% rating and a 70% rating was generally one of scope, as the 70% rating required "deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood," while 50% rating only required "reduced reliability and productivity." [R. at 18]; *see* 38 C.F.R. § 4.130. The Board, further, explained that a 70% rating not only requires the presence of symptoms of similar severity, frequency, as those outlined in the diagnostic code but that those symptoms cause occupational and social impairment in most areas. *Id.* (citing *Vazquez-Claudio*, 713 F.3d at 117). Again, this explanation is appropriate and complies with the previous remand instructions from the Court. *See Jones*, 26 Vet.App. at 61.

Appellant's argument that the Board required total deficiency in most areas amounts to a disagreement with the Board's decision. *See* App. Br. at 17-19. Appellant fails to point to anywhere that the Board says it is requiring such total deficiency. The Board plainly did not require total deficiency in the area of work, and instead found that Appellant "generally functioned satisfactorily but had decreases in work efficiency and periods of inability to perform his occupational tasks that occurred at irregular and infrequent intervals." [R. at 19-20]. While Appellant may disagree, that is not remandable error.

Appellant also argues that the Board did not adequately consider his "near constant anxiety," "obsessive rituals," and "impaired impulse control." App. Br. at

18, 23. However, the Board explicitly disagreed with these characterizations of his symptoms. [R. at 21-22]. The Board recognized that Appellant experienced anxiety but found it did not prevent him from functioning appropriately or independently. [R. at 21]. While Appellant argues the presence of his career counselor demonstrated that he could not function independently, App. Br. at 21-22 (citing [R. at 2785]), the Board discussed the specific record Appellant references, and found that such assistance obtaining and maintaining his job was primarily due to his non-service-connected back condition, [R. at 29-30], and the counseling that Appellant received for his GAD demonstrated only infrequent, episodic, and discrete impairment, [R. at 32-33]. To the extent Appellant argues that he sometimes uses inappropriate language, this is different than the ability function appropriately. *See* App. Br. at 22. The Board also noted that Appellant demonstrated obsessive behaviors but found that he could generally function satisfactorily. [R. at 21]. The Board specifically acknowledged that such obsessive behavior interfered with his sleep but found sleep impairment compensated by a 30% rating. *See* [R. at 18] (recognizing Appellant experienced sleep impairment and such symptoms best approximated by a 30% rating); [R. at 21] (noting cause of such sleep impairment); *see also* 38 C.F.R. § 4.130 (listing sleep impairment as a symptom indicative of a 10% rating). Finally, while the Board acknowledged angry outbursts it found that he did not demonstrate impaired impulse control because the "overwhelming majority of records" demonstrated Appellant had "pleasant behavior, logical thought processes, and normal thought content" along

with no actual reported violence. [R. at 22]. Thus, to the extent Appellant argues that the Board exclusively relied on their being no actual violence to find impaired impulse control, he only selectively reads the Board's analysis. App. Br. at 22.

Further, Appellant's argument that the evidence demonstrated that he had an inability to establish relationships is without merit. *See* App. Br. at 23-24. As discussed above, the Board explicitly considered Appellant's social relationships. The Board acknowledged that Appellant had some difficulty in establishing and maintaining social relationships, including intermittent marital troubles, but it found that the evidence overall indicated that Appellant was able to maintain relationships and had generally positive social relationships. [R. at 20-21]; [R. at 23]. While Appellant argues that the evidence the Board cited only says he was able to maintain a relationship, this is a mere disagreement with the Board's findings. *See* App. Br. at 23. Finally, to the extent Appellant argues that the Board requires that Appellant demonstrate all the enumerated symptoms in the diagnostic code to warrant a given rating, he fails to point to any reason to believe this. *See* App. Br. at 19-20. The Board explicitly considered the possibility of symptoms of a similar severity, frequency, as those outlined in the diagnostic code. *See* [R. at 18]; [R. at 19]; [R. at 20]. While Appellant disagrees with the Board's findings, he fails to identify any evidence the Board did not consider, any findings inadequately explained, or any other error.

II. Appellant fails to demonstrate error in the Board's finding that TDIU was not warranted

Appellant fails to demonstrate error in the Board's finding that TDIU was not warranted. An award of TDIU requires that the claimant show an inability to undertake substantially gainful employment as a result of a service-connected disability or disabilities. 38 C.F.R. § 4.16. In determining whether a claimant is unable to secure or follow a substantially gainful occupation, the central inquiry is "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (citing *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993)). Whether a claimant is unable to secure or follow substantially gainful employment is a finding of fact that the Court reviews under the "clearly erroneous" standard. *Id.*; 38 U.S.C. § 7261(a)(4).

The Board offered adequate reasons or bases for finding TDIU not warranted. As the Board explained, Appellant's GAD was the only service-connected condition that caused occupational impairment. [R. at 34]. While Appellant's GAD caused some level of occupational impairment, the Board found that it did not render Appellant unable to secure or follow substantially gainful employment. [R. 31-35]. The Board found particularly probative Appellant's C&P examinations and medical records, which discussed his mental health status in great detail. [R. at 32]. The Board explained that the records demonstrated that he experienced a social ability that would permit him to secure and follow substantially gainful employment, [R. at 32], and that, while Appellant demonstrated he experienced difficulty adapting to stressful circumstances, he

was able to maintain his position at the DMV for 12 years with minimal help and only infrequent, episodic, and discrete problems, [R. at 32-33]. The Board, thus, concluded that extraschedular referral for TDIU was not warranted. [R. at 35]. The Board's findings and conclusions are understandable and plausible.

While Appellant argues that the Board found he was not eligible for TDIU unless his symptoms resulted in a 100% rating, he mischaracterizes the opinion. *See* App. Br. at 24. The Board here applied the proper standard. *See e.g.*, [R. at 27-28] (stating that TDIU is warranted when a veteran is unable to secure or follow substantially gainful occupation because of service-connected disabilities); [R. at 35] (finding Appellant's "service-connected disabilities do not prevent him from obtaining or maintaining substantially gainful employment"). To the extent the Board discusses whether Appellant is unemployable, it is because Appellant argued that he was unemployable due to his GAD. *See* [R. at 122-23] (arguing that Appellant needed to retire because of his anxiety and has not worked in any capacity due to his service-connected disabilities). Reading the Board decision as a whole, it is clear that the Board was applying the proper standard, and Appellant fails to identify error. *See Janssen v. Principi*, 15 Vet.App. 370, 379 (2001).

Appellant's argument that the Board required an inappropriate standard for social functioning is similarly without merit. *See* App. Br. at 25-26. As explained above, the Board adequately explained its consideration of social functioning in reference to Appellant's GAD. *See* [R. at 20]. The Board referenced this previous discussion of his social symptoms and found that these symptoms were not severe

enough to warrant referral for extraschedular TDIU. [R. at 31-32]. While Appellant disagrees with the Board's finding that his social impairment is such that it does not prevent obtaining and maintaining substantially gainful employment, this disagreement does not amount to remandable error. To the extent Appellant argues that the Board's consideration of social impairment at all is inappropriate, he fails to recognize the requirements outlined in *Ray v. Wilkie*. In *Ray*, the Court found that attention should be given to a claimant's physical and mental abilities as well as his history, education, skill, and training. *Ray*, 31 Vet. App. at 73. In regard to mental abilities, the Court found that social skills and ability to adapt to workplace stress may both be relevant to the issue. *Id.* at 72. The Board here specifically discussed both of these elements in its decision and analyzed their effect on Appellant's ability to pursue substantially gainful employment, in line with *Ray*. *See id.*; [R. at 31-35]. Thus, Appellant fails to demonstrate error.

Further, while Appellant argues that the Board shows a "misunderstanding of the requirements of work," he fails to demonstrate that his interpretation of the evidence is the only plausible interpretation. *See Anderson*, 470 U.S. at 574. To the extent he relies on SSA law to support his interpretation, as discussed above, these laws are not binding on the Board or the Court. Again, Appellant's argument amounts to a disagreement with the decision and not remandable error.

While Appellant argues that the Board did not explain how Appellant's retirement age weighed against the claim, he fails to recognize that the Board here was just addressing Appellant's counsel's argument. *See* App. Br. at 27-29.

Appellant's counsel previously argued that Appellant retired because of his anxiety. [R. at 122]. The Board addressed this argument by finding that the contemporaneous evidence of record did not indicate that he retired due to his GAD but that his retirement has scheduled and aged-based. [R. at 33-34]; *see* [R. at 2502-03] (2007 C&P examination in which Appellant stated that "he plans to continue working until age 65 when his wife will be age 62 and the two of them can retire with full benefits"); [R. at 2208] (2010 C&P examination, in which Appellant stated that he previously retired from the DMV because he was eligible due to age or duration of work). The Board found that, if Appellant was retiring due to worsening GAD symptoms, he would have said so in the contemporaneous records. [R. at 33-34]. The Board found probative that Appellant did not say this in any contemporaneous records and, instead, attributed his retirement purely to age and duration of work. *Id.* The Board explained that this was clear evidence that his GAD was not the reason for his retirement. *Id.* While the Board discussed Appellant's retirement age to address Appellant's attorney's argument that he retired due to his GAD, the Board did not rely on his reason for retirement to deny TDIU. *See* [R. at 34] (explaining "[t]he fact [that Appellant] stopped working based on age-based retirement does not automatically mean the TDIU claim is denied"). Thus, Appellant's argument is without merit.

Appellant also argues that the Board did not adequately address the 2016 assessment's criticism of the 2007 C&P examination. App. Br. at 27-29. However, the Board explicitly addressed the 2016 assessor's allegations that Appellant

received external support, was written up at work, and was demoted to assembling, which were the reasons that the assessor believed the 2007 C&P examiner's opinion was wrong. *See* [R. at 29-30]; [R. at 1029-30]. The Board acknowledged that Appellant's duties were changed but did not find any indication that such change in duties was due to his GAD or other service-connected condition. [R. at 29-30]. Further, the Board acknowledged external counseling but it found that such counseling was primarily received due to his non-service-connected back condition, [R. at 29-30], and the counseling that Appellant received for his GAD, as well as the seven documented personnel actions over 12 years only demonstrated only infrequent, episodic, and discrete impairment, [R. at 32-33]. The Board found the July 2016 assessment inconsistent with the more contemporaneous records and, thus, of limited probative value. [R. at 34]. Appellant fails to demonstrate how this explanation is insufficient. Further, even if the Board had not addressed the 2016 assessment's criticism of the January 2007 C&P examiner's characterization that Appellant's GAD caused "minimal impairment of work," Appellant fails to demonstrate how this is prejudicial because the Board does not rely on this aspect of the 2007 C&P examination. *See* [R. 34]; *see also Bryant v. Shinseki*, 23 Vet.App. 488, 498 (2010) ("[T]he assessment of prejudice generally is case specific, demonstrated by the appellant and based on the record."); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (finding remand is unnecessary in the absence of demonstrated prejudice). Thus, remand is not warranted.

III. Appellant fails to demonstrate reversal is warranted

Appellant requests that the Board decision with respect to GAD be remanded or reversed, but he fails to demonstrate that either remedy is warranted. *See* App. Br. at 10, 14. As previously explained in this brief, remand is not warranted. Reversal is also inappropriate. Reversal is the appropriate remedy "when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). As demonstrated throughout this brief, Appellant has not shown that the only permissible view of the evidence is contrary to the Board's findings. Thus, Appellant has not carried his burden of demonstrating that the only permissible view of the evidence is against the Board's finding as to warrant reversal by this Court. *See Gutierrez*, 19 Vet.App. at 10.

IV. Appellant has abandoned all issues not argued in his brief

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the November 28, 2018, Board decision that denied entitlement to a disability rating higher than 30% for GAD and entitlement to TDIU.

Respectfully submitted,

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