No. 19-1907

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOHN STANLEY PEARSON,
Appellant,

v.

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

APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

CITATIONS TO THE RECORD BEFORE THE AGENCY

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JOHN STANLEY PEARSON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-1907
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the January 22, 2019, Board of Veterans' Appeals (Board) Decision, which denied the claim of entitlement to a rating in excess of 50% for posttraumatic stress disorder (PTSD) and alcohol use disorder.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

John Stanley Pearson (Appellant) seeks the Court's review of the January 22, 2019, Board decision that denied him entitlement to a rating in excess of 50% for PTSD and alcohol use disorder. Record Before the Agency (R.) at 1-20. The Board found that for the entire appeal period, Appellant's PTSD and, as of August 28, 2017, alcohol use disorder, was manifested by symptomatology resulting in occupational and social impairment with reduced reliability and productivity. R. at 5 (1-20). In turn, the Board concluded that the criteria for a rating in excess of 50% for PTSD and alcohol use disorder had not been met. *Id.*

In response, Appellant contends that the Board erred by not providing an adequate statement of reasons or bases for its determination and by relying on an August 2017 VA medical opinion that he asserts was inadequate for rating purposes. *See* Appellant's Brief (A.B.) at 1-25. As such, he requests that the Board's decision be vacated and remanded for further adjudication. *See* A.B. at 25 (1-25).

C. Statement of Relevant Facts

John Stanley Pearson had active duty service from March 1969 to April 1971. R. at 4167. In April 2008, he submitted an informal claim of entitlement to service connection for PTSD to the Regional Office (RO). R. at 3828-29. The RO considered his claim in the September 2008 rating decision and granted him service connection for PTSD with an evaluation of 50%, effective April 16, 2008.

R. at 3535-55. In response, Appellant submitted a Notice of Disagreement (NOD) with the RO's decision to the RO in October 2008. R. at 3490-91.

Following, copies of Appellant's VA treatment records were obtained and associated with his VA file. R. at 2479-2550; 2554-2618; 2687-2732. Appellant also underwent a VA PTSD examination in November 2011. R. at 2449-59. At that time, the examiner diagnosed Appellant with PTSD and determined that the impact of his condition was best summarized as occupational and social impairment with reduced reliability and productivity. R. at 2450-52 (2449-59).

Thereafter, the RO issued the December 2011 rating decision that denied Appellant entitlement to an increased rating for his service-connected PTSD. R. at 2353-76. In reply, Appellant submitted an NOD with the RO's decision to the RO in February 2012. R. at 2332-39. Afterwards, the RO issued the February 2013 Statement of the Case (SOC) that continued Appellant's evaluation for his service-connected PTSD as 50% disabling. R. at 1442-1504. In turn, Appellant submitted a formal appeal to the Board. R. at 1421-36. A few months later, the Board issued the October 2013 decision that remanded Appellant's claim for further development and adjudication. R. at 1405-08.

As part of that development, Appellant was afforded and participated in a hearing before the Board in June 2014. R. at 1382-96. Following the hearing, the Board issued the August 2014 decision, which again remanded Appellant's claim for further development and adjudication. R. at 1352-64. On remand, additional VA treatment records were obtained and associated with Appellant's VA file. R. at

770-926. Thereafter, the RO issued the November 2014 Supplemental SOC (SSOC) that continued Appellant's evaluation for his service-connected PTSD as 50% disabling. R. at 700-11.

In May 2017, the Board considered Appellant's claim and again determined that remand for further development was necessary at that time. R. at 527-33. In accordance with the Board's instructions, copies of Appellant's VA treatment records were obtained and added to his VA file. R. at 208-522. Additionally, Appellant was provided with and participated in a VA PTSD examination in August 2017. R. at 203-07.

At that time, the examiner diagnosed Appellant with PTSD and alcohol use disorder and noted that his PTSD was manifested by symptoms of anxiety, suspiciousness, chronic sleep impairment, mild memory loss, and difficulty in establishing and maintaining effective work and social relationships and in adapting to stressful circumstances, including work or a worklike setting. *Id.* The examiner summarized the impact of Appellant's condition as occupational and social impairment with reduced reliability and productivity. R. at 204 (203-07). The doctor explained that "the vet's ptsd is resulting in moderate to considerable impairment and does not render him unable to secure and maintain substantially gainful employment." R. at 207 (203-07).

Following, Appellant submitted correspondence to the Board, in October 2017, contending that "the examination was not performed by an expert with adequate training" and asserting that "a psychiatrist specializing in PTSD

symptoms should have been chosen to assist the RO and Board in its determination." R. at 167 (166-67).

In consideration of Appellant's submission, the RO issued the November 2018 SSOC that denied Appellant an increased rating. R. at 125-30. Afterwards, additional VA treatment records were obtained and associated with Appellant's VA file. R. at 55-117. Appellant also reiterated to the Board, in January 2019, his claim that a more specialized examiner than the August 2017 VA examiner was necessary to evaluate his PTSD condition. R. at 21-22.

That same month, the Board issued the decision on appeal. R. at 1-20. Relevantly, the Board explicitly addressed Appellant's contention regarding the August 2017 VA examiner and explained that the examiner "is a Licensed Clinical Psychologist with a Ph.D. degree." R. at 16 (1-20). On March 20, 2019, Appellant filed his Notice of Appeal with the Court.

III. SUMMARY OF ARGUMENT

The Court should affirm the January 22, 2019, Board decision, which denied Appellant's claim of entitlement to a rating in excess of 50% for PTSD and alcohol use disorder. The Board's conclusion is plausible considering the evidence of record, and therefore, is a permissible view of the evidence of record. Moreover, its statement of reasons or bases explaining its findings allows for review by this Court and assists Appellant in understanding the precise basis for its decision. In addition, Appellant's arguments are often and explicitly contradicted by the plain text of the Board's decision and the evidence of record, and amount to nothing

more than mere disagreements with the Board's weighing of the evidence and the August 2017 VA examiner's medical judgment. Accordingly, the Court should reject those contentions and affirm the Board's decision.

IV. ARGUMENT

A. Standard of Review

The Court reviews the Board's findings of fact under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard), *quoting United States v. United States Gypsum Co.*, 333 U.S. 564, 595 (1948); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

Moreover, in rendering its decision, the Board is required to provide a written statement of its "findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to

facilitate review in this Court. *See Gilbert v. Derwinski,* 1 Vet.App. 49, 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 to be persuasive or unpersuasive and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown,* 7 Vet.App. 498, 506 (1995*)*. However, section 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Also relevant to the Court's standard of review is that the appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), ***aff'd*** 232 F.3d 908 (Fed. Cir. 2000). The appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("courts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. The Court should affirm the Board's decision denying Appellant entitlement to a rating in excess of 50% for PTSD and Alcohol Use Disorder.

a. Appellant's assessment of the findings in the August 2017 VA examination amount to nothing more than a mere disagreement with the Board's weighing of that evidence.

Appellant first contends that the Board clearly erred when it determined that he was not entitled to a rating in excess of 50% for his service-connected PTSD and alcohol use disorder. *See* A.B. at 9-11 (1-25). His assertion, however, is not based on evidence of record that the Board did not consider, but instead is founded on his belief that "[t]he Board only considered some symptoms listed in the August 2017 medical exam and not the entirety of the findings." A.B. at 10 (1-25). His argument should be rejected for the reasons stated below.

First, the plain language of the Board's decision contradicts Appellant's claim that the Board failed to consider the findings he references in his argument. Particularly, not only did the Board provide a lengthy summary of the contents of the August 2017 VA PTSD examination, the Board explicitly noted that "the examiner noted symptoms of anxiety, suspiciousness, chronic sleep impairment, mild memory loss, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances, including work or a worklike setting." R. at 13 (1-20). In addition, and in further consideration of that specific evidence, the Board explained that "the nature, frequency, duration, and severity" of that specific evidence resulted in "no more than occupational and social impairment with reduced reliability and productivity, which is consistent with

his current assigned 50 percent rating." R. at 14 (1-20). Because it is clear from the plain language of the Board's decision that it weighed and assessed the evidence referenced by Appellant in his argument, Appellant's contention to the contrary cannot be viewed as anything other than a mere disagreement with how the Board weighed that evidence, which is insufficient to meet his burden of demonstrating prejudicial error. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (It is the Board's duty "to analyze the credibility and probative value of the evidence"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (It is the province of the Board to weigh and assess the evidence of record).

Additionally, Appellant's argument is premised on either his or his counsel's assessment of the clinical findings contained in the August 2017 VA examination report, but neither he nor his counsel are qualified, under the law, to provide a valuation of the clinical evidence. *See Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (holding that the "[a]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence"). Moreover, he fails to explain why the findings that he has cherry-picked from the August 2017 VA examination report are determinative on the issue of entitlement to a higher rating in this case. *See* A.B. at 9-11 (1-25). Particularly, the Board referenced evidence spanning from July 2010 to March 2018 and explained why the totality of that evidence did not reflect a more severe disability picture sufficient to more nearly approximate entitlement to a higher 70% rating. *See* R. at 10-15 (1-20). Furthermore, and as the Board noted, the examiner also recorded more symptoms that are primarily

consistent with the criteria for the 30% and 50% ratings. *See* R. at 15 (1-20); R. at 207 (203-07).

Finally, and to the extent that Appellant contends that he should have been granted a higher rating simply because some of the symptoms recorded by the August 2017 VA examiner are listed in the criteria for the higher 70% rating, his argument misunderstands the law. Mainly, the Court has explained that "the presence or lack of evidence of a specific sign or symptom listed in the evaluation criteria is not *necessarily* dispositive of any particular disability level." *See Vazquez-Claudio* v. *Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). Instead, "[t]he intermediate disability levels are [] distinguished from one another by the frequency, severity, and duration of their associated symptoms." *Id.* at 116. Further, "in the context of a 70 percent rating, § 4.130 requires not only the presence of certain symptoms but also that those symptoms have caused occupational and social impairment in most of the referenced areas." *Id.* at 117. To this end, not only did the Board consider the evidence referenced by Appellant, it explained why those symptoms did not cause occupational and social impairment comparable to that required for the next higher 70% rating. *See* R. at 14-15 (1-20).

Because the evidence of record shows that the Board considered the findings referenced in Appellant's argument and explained why those symptoms did not establish occupational and social impairment sufficient to satisfy the criteria to warrant the next higher rating, Appellant's contention is nothing more than a

mere disagreement with the Board's weighing of that evidence and is insufficient to satisfy his burden of demonstrating prejudicial error. Accordingly, the Court should reject his argument.

b. The August 2017 VA PTSD examination was adequate for rating purposes and Appellant's mere disagreement with the examiner's medical judgment fails to demonstrate otherwise.

Appellant next argues that the August 2017 VA examination was inadequate for rating purposes. *See* A.B. at 11-15 (1-25). He contends that "[t]he medical findings in the August 2017 exam contradicted the medical examiner's characterization of [his] occupational and social impairment." A.B. at 12 (1-25). More specifically, he asserts that the findings in the exam corresponds to the 70% rating criteria and then proceeds to list what he believes is the determinative evidence. *See* A.B. at 13 (1-25). However, and as noted above, neither Appellant or his counsel are qualified to explain the significance of clinical evidence. *See Kern*, 4 Vet.App. at 353. Moreover, and as the Board noted, the examiner "included a narrative opinion in which she considered the totality of the Veteran's symptoms, and found that such resulted in moderate to considerable impairment." R. at 16 (1-20); R. at 207 (203-07). Accordingly, Appellant's argument cannot be characterized as anything more than a mere disagreement with the examiner's medical judgment, which is insufficient to demonstrate that the examination was inadequate and should be found to be unpersuasive. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

To the extent that Appellant asserts that the examiner failed to provide "analysis as to how [she] assessed [he] had reduced reliability and productivity" and "did not consider how multiple medical findings supported the conclusion that [he] suffered deficiencies in most areas", his argument ignores the plain text of the medical opinion and imposes on the examiner a reasons or bases requirement where there is none under the law. *See* R. at 203-07; *Acevedo* v. *Shinseki*, 25 Vet.App. 286, 293 (2012).

Because Appellant's contention amounts to nothing more than a mere disagreement with the examiner's medical judgment in this case, the Court should reject his assertion that the August 2017 VA medical opinion was inadequate for rating purposes.

c. The Board properly considered Appellant's argument challenging the competency of the August 2017 VA examiner.

Appellant last contends that the Board erred by not properly addressing his challenge of the August 2017 VA examiner's competency and qualifications. *See* A.B. at 15-20 (1-25). Initially, he asserts that "[t]he Board misapplied the shifting burdens and burden of proof in its analysis." A.B. at 17 (1-25). He accurately notes that the Board stated that he had not "provided clear evidence that the examiner was not competent to rebut this presumption." R. at 16 (1-20); *see* A.B. at 17 (1-25). He is also correct that the Board erred in requiring that he produce evidence demonstrating the examiner's incompetence. *See Francway v. Wilkie*, 940 F.3d 1304, 1307 (Fed. Cir. 2019) (explaining that "[a]lthough it is referred to

as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue").

The Board's error, however, is harmless. As the Federal Circuit explained, "once the veteran raises a challenge to the competency of the medical examiner . . . [t]he Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion." *Francway*, 940 F.3d at 1308. Here, the Board did exactly that. Specifically, the Board noted that "the examiner who performed the Veteran's August 2017 VA examination is a Licensed Clinical Psychologist with a Ph.D. degree." R. at 16 (1-20). The Board further noted that "she was the examiner who conducted the Veteran's original PTSD examination in June 2008, and, as such, she is familiar with the Veteran's condition over time." R. at 16-17 (1-20). The Board then concluded that "the Veteran's representative's arguments are without merit, and the August 2017 VA examination is adequate for rating purposes. The Board's analysis and statements are entirely consistent with the holding in *Francway*.

Despite the Board's analysis, Appellant contends that the Board "failed to even state the subject matter of the Ph.D" and "did not address [his] specific concern that a psychiatrist with a specialization in PTSD should have performed his exam." A.B. at 17-18 (1-25). Beyond the fact that Appellant fails to explain

why a licensed psychiatrist would not contain the expertise to evaluate PTSD, a simple search of the August 2017 VA examiner shows that she indeed "specializes in the treatment of [] mental [health] problems, and helps people to cope with their mental illnesses." https://www.findatopdoc.com/doctor/2710459-Phoebe-Mcleod-psychologist-Columbia-SC-29205 (last visited January 15, 2020).

Because the Board's analysis is consistent with the Federal Circuit's holding in *Francway* and because Appellant fails to provide any valid reason as to why the Board's analysis was not plausible, the Court should reject his argument.

The Court should also find unpersuasive Appellant's contention that the Board "failed to provide an adequate statement of reasons or bases for its determination that the August 2017 medical exam was adequate." A.B. at 18 (1-25). Like many of his other arguments, this assertion too is based on Appellant's or his counsel's unqualified assessment of the clinical findings contained in the August 2017 VA examination and amounts to nothing more than a mere disagreement with the Board's weighing of that evidence. *See Kern*, 4 Vet.App. at 353; *Stefl*, 21 Vet.App. at 123.

Mainly, Appellant correctly acknowledges that the Board addressed his contention (*See* A.B. at 18-19 (1-25); R. at 15-16 (1-20). Nonetheless, he claims that there were several symptoms in the August 2017 medical exam that supported a higher rating and that "[t]he Board's failure to discuss these additional medical findings in support of [his] claim frustrates this Court's review." A.B. at 18 (1-25). The plain text of the Board's decision, however, clearly shows that the Board

considered all of the August 2017 VA examiner's findings. *See* R. at 12-17 (1-20). Furthermore, Appellant's characterization of the evidence as symptoms clearly reflective of the higher 70% rating criteria is based purely off of his or his counsel's unqualified assessment.

Again, because Appellant's argument amounts to nothing more than a mere disagreement with the Board's weighing and assessment of the evidence, the Court should reject that argument and affirm the Board's decision.

V. CONCLUSION

For the foregoing reasons, Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits that the Court should affirm the Board's January 22, 2019, decision, which denied Appellant's claim of entitlement to a rating in excess of 50% for PTSD and alcohol use disorder.

Respectfully submitted,

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