Vet.App. No. 19-4141

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT H. WRIGHT, JR.,

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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	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

Whether the Court should affirm the May 31, 2019, Board of Veterans' Appeals (BVA or Board) decision that denied Appellant's claims of entitlement to service connection for bilateral hearing loss disability and tinnitus, and also denied entitlement to a grant of total disability based on individual unemployability (TDIU).

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Jurisdiction is based upon 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. NATURE OF THE CASE

Appellant, Robert H. Wright, Jr., appeals the Board decision of May 31, 2019, that denied his claims of entitlement to service connection for bilateral hearing loss disability and tinnitus, and also denied him entitlement to a grant of a TDIU. (Record (R.) at 1-19).

C. STATEMENT OF THE RELEVANT FACTS

Because Appellant has limited his allegations to the arguments identified herein, the Secretary will limit the statement of facts accordingly.

Appellant served in the U.S. Army on active service from 1968 to 1970. (R. at 1401).

Appellant's service treatment records (STRs) document hearing within normal limits of testing at his entrance examination in 1968 (R. at 1374 (1373-1374)) and also at his separation in 1970 (R. at 1390 (1388-1391)).

In 2014, Appellant filed claims of entitlement to service connection for bilateral hearing loss and tinnitus. (R. at 1179). Appellant then underwent a VA examination in September 2014, where the examiner

diagnosed Appellant with hearing loss and tinnitus. (R. at 411-417). After considering, *inter alia*, Appellant's statements of noise exposure during service, the examiner opined that the bilateral hearing loss and tinnitus were not related to service. (R. at 413-416).

In October 2014, a rating decision was issued that denied the claims of entitlement to service connection for bilateral hearing loss and tinnitus. (R. at 1007-1009). Appellant then filed a notice of disagreement (NOD) (R. at 980-981) and in April 2015 a statement of the case (SOC) was issued that continued to deny the claims. (R. at 927-948).

In November 2015, Appellant submitted a Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire (DBQ) and sought service connection for PTSD and entitlement to TDIU. (R. at 885-892). On the DBQ for PTSD, the social worker who completed it stated that Appellant had "retired early due to the reaction he had to stress on the job… severe anger issues working, and rages." (R. 887). The report also stated that Appellant "was never late for work or absent. His main behavior that interfered with employment related to rages, difficulty keeping collaborative work relationships." (R. at 886). The social worker marked that Appellant had total occupational and social impairment due to PTSD. *Id*.

In January 2016, Appellant underwent a VA PTSD examination and the examiner diagnosed PTSD and checked the box that stated Appellant

had occupational and social impairment with reduced reliability and productivity. (R. at 353 (352-359)). Appellant reported retiring after working for 40 years at a lumber company. (R. at 355).

A two sentence January 2016, medical letter simply stated that Appellant "has been diagnosed with polyneuropathy. This can interfere with his ability to work." (R. at 608). The doctor did not provide any reason for that statement in the letter.

In February 2016, Appellant's employer submitted a VA employment information form and stated Appellant had most recently worked as a lumberyard foreman and had worked from September 1972 to December 2011. (R. at 645-646). The employer stated that in December 2011, Appellant retired, received a lump sum payment, and also receives regular retirement pay. *Id*.

Also, in February 2016, a VA examination report for peripheral neuropathy revealed that Appellant reported retiring in 2012 and stated that the peripheral neuropathy should not impact substantially gainful activity, but Appellant may be limited from more physically challenging tasks. (R. at 342, 348 (340-348)).

In March 2016, Appellant filed an appeal to the Board in relation to his claims for service connection bilateral hearing loss and tinnitus. (R. at 748-751).

In April 2016, a rating decision, *inter alia*, denied the claim of entitlement to a TDIU. (R. at 629-630 (625-634)). Appellant then filed a NOD with that decision (R. at 611-612) and a June 2016 SOC was issued that continued to deny the TDIU claim. (R. at 581-601). Appellant then appealed that denial to the Board. (R. at 481).

In October 2018, Appellant submitted an October 2018 medical opinion in which the doctor opined that Appellant's PTSD interferes with substantial gainful activity, but there was no rationale beyond the statement that the PTSD symptoms cause significant distress and interfere with the ability to seek or maintain gainful employment. (R. at 296).

In January 2019, Appellant testified at a Board hearing that he was exposed to loud artillery fire on a daily basis while in service (R. at 87-89 (85-106)) and after service he worked at a lumberyard for 40 years (R. at 101-102). He stated that PTSD caused him to lose his temper at work and has "rage" that was due to his PTSD. (R. at 100-102).

A March 2019 VA treatment record, Appellant reported staying at home most of the time that resulted in him interacting less with others and he reported reduced irritability. (R. at 61 (60-62)).

On May 31, 2019, the Board issued the decision on appeal that denied the claims of entitlement to: (1) service connection for bilateral hearing loss disability; (2) service connection for tinnitus; and (3) a grant of a TDIU. (R. at 1-19).

SUMMARY OF THE ARGUMENT

The Board's May 31, 2019, decision should be affirmed. The Secretary respectfully contends that Appellant has not established entitlement to service connection because the preponderance of the evidence shows that neither the bilateral hearing loss nor tinnitus is related to service, and there is a plausible basis (which is supported by an adequate statement of reasons or bases) for the Board's denials. Further, the Secretary respectfully contends that the Board's decision denying Appellant's claim of entitlement to TDIU based upon service-connected disabilities is supported by a plausible basis in the record and should be affirmed. The Board correctly analyzed the applicable law, set forth the relevant evidence, and provided an adequate statement of reasons or bases for its denials.

Additionally, Appellant does not point to any error in the BVA decision or dispute the facts found or the conclusions made by the Board regarding the denials of the BVA decision on appeal. (*See* Appellant's Informal Brief (AB)). Because Appellant has not articulated any cogent basis for disturbing the Board's determinations, the Court should affirm the Board decision on appeal.

APPLICABLE LAW

In order to establish entitlement to service connection for a claimed disability, there must be: (1) medical evidence of a current disability; (2)

medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999).

The Board's determination of whether a claimant is entitled to service connection is a factual finding that this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *See Wensch v. Principi*, 15 Vet.App. 362, 366 (2001). In determining whether a finding is "clearly erroneous," this Court cannot "substitute its judgment for that of the BVA on issues of material fact." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). If there is a plausible basis in the record for the Board's factual determinations, this Court cannot overturn them. *Id*.

Additionally, TDIU rating may be assigned to a veteran who meets certain disability percentage thresholds and is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a). Whether a claimant is unable to secure or follow substantially gainful employment is a finding of fact that this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *Bowling v. Principi,* 15 Vet.App. 1, 6 (2001). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United*

States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990).

As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert,* 1 Vet.App. at 56–57.

ARGUMENTS

A. Hearing Loss and Tinnitus

The Board noted that Appellant claimed that his bilateral hearing loss and tinnitus are due to noise exposure during service. (R. at 9). The Board then reviewed the evidence of record to include: (1) that Appellant's STRs documented hearing within normal limits of testing at his entrance examination in December 1968 (R. at 1374) and also at his separation in August 1970 (R. at 1390); (2) that during his January 2019 Board hearing Appellant stated he was in the artillery during service and testified that he was exposed to loud artillery fire on a daily basis while in service. (R. at 87-89); and (3) in a VA examination report of September 2014, the examiner diagnosed Appellant with hearing loss and tinnitus, and after considering Appellant's statements of noise exposure during service, and post-service, opined that the bilateral hearing loss and tinnitus were not related to active service. (R. at 411-417).

The Board, after weighing the evidence, determined that the evidence of record showed that the hearing loss and tinnitus were not related to service. (R. at 10-11). In doing so it determined that the September 2014 VA opinion that found that the hearing loss and tinnitus were not related to service) was the most probative evidence and relied on it to deny the claims. Specifically, the Board stated:

> While the Veteran is competent to report symptoms of tinnitus, to the extent that the Veteran may contend that he has hearing loss and tinnitus since service, the Board places greater probative weight on the findings of the VA examiner regarding the etiology of his current disability as the examiner rendered his opinion after consideration of the Veteran's medical history and current audiometric findings, to include consideration of in-service noise exposure as well as 40 years of occupational noise exposure. This finding is consistent with the Veteran's medical records which do not show any complaints, treatment, or diagnosis of a hearing loss disability for many years following service.

(R. at 10) (underline added).

The Secretary respectfully submits that the Board properly considered the law and evidence, and thereafter determined, based on its weighing, that Appellant was not entitled to service connection for bilateral hearing loss or tinnitus. (R. at 9-11). In doing so, the Board determined that the preponderance of the evidence was against the claims and thus, the benefit of the doubt doctrine was not applicable. (R. at 11). Based on the foregoing, the Board provided an adequate statement of reasons and bases for its findings and there is a plausible basis in the record for its

decision. As a result, the Board's decision should be affirmed. *See Gilbert*, 1 Vet.App. at 53.

Although mindful that Appellant is unrepresented before the Court, the Court should affirm the Board decision due to the lack of a cogent argument warranting a different result. (*See* AB). Appellant fails to present any discernable argument demonstrating remandable or reversible BVA error. *Moore v. Nicholson*, 21 Vet.App. 211, 214 (2007) ("appellant bears the burden of persuading the Court that the Board decision below is tainted by a prejudicial error that warrants reversing or remanding the matter"). *See also Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (appellant carries burden of persuasion regarding contentions of error); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (appellant bears burden of demonstrating error and precise relief sought). As noted above, the Board considered the relevant law and evidence of record, and adequately explained its decision. (R. at 6-11). As a result, the Board decision should be affirmed.

In his brief, Appellant argues that the Board incorrectly found that his hearing loss and tinnitus did not relate to service. (AB at 1-2). He argues that his hearing loss and tinnitus were caused by service, as he was in the artillery, and that the post-service noise exposure in the lumberyard did not cause his hearing loss and tinnitus. *Id*. However, that argument is not persuasive because the Board did account for that lay contention, but

found Appellant not competent to make such a medical opinion. (R. at 10).

Here, the Board weighed the evidence, to include Appellant's lay statements, as well as that the September 2014 VA opinion, and plausibly found that the September 2014 medical opinion of greater probative weight. It should again be noted that the examiner in the September 2014 examination report considered the evidence of record, to include Appellant's in-service and post-service noise exposure, and then the examiner opined, in her professional medical opinion, that the bilateral hearing loss and tinnitus were not related to service. (R. at 413-417).

As a result, Appellant's argument is not persuasive. At most, Appellant is arguing that he believes that his weighing of the evidence shows he is entitled to service connection. However, it is the province and responsibility of the Board to weigh the credibility and evidence with respect to Appellant's claims. *Davis v. West*, 13 Vet.App. 178, 184 (1999); *Evans v. West*, 12 Vet.App. 22, 30 (1998); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). As discussed above, the Board's weighing of the evidence in this case is within its purview as factfinder and should not be disturbed because it is supported by the record. Again, the Board had a plausible basis for its determinations and the Court should affirm the decision on appeal.

Based on the foregoing, Appellant has failed to identify any law or regulation that was wrongfully applied by the Board in its decision, nor

does he offer any legal or factual challenge to demonstrate that the BVA decision is clearly erroneous. As a result, the Secretary respectfully submits that the Court should affirm the Board's plausible determination that Appellant was not entitled to service connection for bilateral hearing loss disability and tinnitus.

B. TDIU

The Board noted that Appellant was seeking a TDIU and that he met the schedular requirements for consideration of TDIU, as he was service-connected for: PTSD at 50% from November 30, 2015; prostate cancer (inactive) at 40% from March 5, 2014; diabetes mellitus type II at 20% from March 5, 2014; and peripheral neuropathy of the left and right upper and lower extremities at 10% each. (R. at 11-13); *See* 38 C.F.R. § 4.16(a).

The Board then reviewed the evidence of record (R. at 13-15), to include: (1) Appellant separated from service in September 1970 and then, after decades of working at a lumberyard, retired in December 2011. (R. at 101-102); (2) VA examinations in May 2014 for peripheral neuropathy (R. at 216-221), diabetes mellitus (R. at 228-230) and prostate cancer (R. at 222-226), in which the examiner opined that each of these conditions had no impact on the ability to work. (R. at 221, 226, 229-230). Appellant reported that the peripheral neuropathy in his hands makes it more difficult to tie a fish hook. (R. at 217); (3) at a November 2015 VA mental health appointment, Appellant reported that he "does not do much since retiring"

and reported that he enjoyed collecting coins and going fishing. (R. at 373-374)); (4) a November 2015 DBQ for PTSD that noted Appellant stated he last worked in December 2011 and that he had stopped working due to diabetes mellitus, prostate cancer, and peripheral neuropathy. (R. at 885-892). On the DBQ for PTSD, the social worker who completed the DBQ wrote that the Veteran had "retired early due to the reaction he had to stress on the job… severe anger issues working, and rages." (R. 887). The report also stated that he "was never late for work or absent. His main behavior that interfered with employment related to rages, difficulty keeping collaborative work relationships." (R. at 886). The social worker marked that Appellant had total occupational and social impairment due to PTSD. *Id*.; (5) in February 2016, Appellant's employer submitted the VA employment information form and stated Appellant had most recently worked as a lumberyard foreman and had worked from September 1972 to December 2011. (R. at 645-646). The employer stated that in December 2011, Appellant retired, received a lump sum payment, and also receives regular retirement pay. *Id*.; (6) in January 2016, Appellant underwent a VA PTSD examination and the examiner diagnosed PTSD and checked the box that stated Appellant had occupational and social impairment with reduced reliability and productivity. (R. at 353). Appellant reported working for 40 years at a lumber company and taking early retirement. (R. at 355); (7) in 2016 VA examinations for prostate cancer and diabetes mellitus, the

examiners found that these disabilities did not impact the Appellant's ability to work. (R. at 363 (359-364)) (R. at 352 (350-352)); (8) in a February 2016 VA examination for peripheral neuropathy, Appellant reported retiring in 2012 and the examiner stated that the peripheral neuropathy should not impact substantially gainful activity, but Appellant may be limited from more physically challenging tasks. (R. at 342, 348); (9) in Appellant's January 2019 Board hearing, he testified that he worked for 40 years in the same job (at a lumberyard) and that losing his temper at work and having "rage" were due to PTSD. (R. at 100-102); (10) a January 2016, medical opinion dated in which the doctor simply stated that Appellant "has been diagnosed with polyneuropathy. This can interfere with his ability to work." (R. at 608). The doctor did not any support for that statement. *See Id*.; (11) an October 2018 medical opinion in which the doctor opined that Appellant's PTSD interferes with substantial gainful activity, but there was no rationale beyond the statement that the PTSD symptoms cause significant distress and interfere with the ability to seek or maintain gainful employment. (R. at 296); and (12) a March 2019 VA treatment record, in which Appellant reported staying at home most of the time that resulted in him interacting less with others and he reported reduced irritability. (R. at 61 (60-62)).

The Board, after weighing the evidence, determined that the evidence of record did not show that Appellant was unemployable due

solely to his service-connected disabilities. (R. at 15-16). In doing so, the Board provided an adequate statement of reasons or bases for its determination. *Id*. The Secretary respectfully submits that the Board properly considered the law and evidence, and thereafter determined, based on its weighing, that "[t]he record documents that the Veteran's service-connected disabilities do not prevent him from securing or following a substantially gainful occupation consistent with his work and educational background." (R. at 7); *See* (R. at 15-16). Based on the foregoing, the Board provided an adequate statement of reasons and bases for its findings and there is a plausible basis in the record for its decision. As a result, the Board's decision should be affirmed. *See Gilbert*, 1 Vet.App. at 53.

Although mindful that Appellant is unrepresented before the Court, the Court should affirm the Board decision due to the lack of a cogent argument warranting a different result. (*See* AB). Appellant fails to present any discernable argument demonstrating remandable or reversible BVA error. *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (appellant bears burden of demonstrating error and precise relief sought). As noted above, the Board considered the relevant law and evidence of record, and adequately explained its decision. (R. at 11-16). As a result, the Board decision should be affirmed.

In his brief, Appellant states that he is entitled to a TDIU based on the medical reports that found that his PTSD made working more difficult, and that he was embarrassed due to his prostrate and the neuropathy made his hands and feet useless. (AB at 2). However, Appellant's argument is not persuasive because, at most, Appellant argument is only based on his assessment of the record. Here, the Board reviewed the evidence, to include favorable medical opinions, but found that the favorable opinions did not contain any rationale, and, as a result were less probative. (R. at 13-15). Here, the Board stated, in part, that:

> The record does not show that the Veteran has attempted to find employment since retiring from the lumberyard, but that he spends his time at the house, with his family, or participating in recreational activities. VA examiners have found that his service-connected disabilities of diabetes mellitus and prostate cancer (inactive) do not prohibit him from participating in employment, but that his service-connected disability of peripheral neuropathy may prevent him from "more physically challenging tasks" and that his service-connected PTSD "could be rated as causing occupational and social impairment with reduced reliability and productivity." The Veteran has not had any inpatient treatment for PTSD. The Board acknowledges the medical opinions relating that the Veteran is prohibited from gainful activity due to either PTSD or polyneuropathy, or that the Veteran has total occupational and social impairment from PTSD, however, the opinions lack further explanation or rationale and therefore, the more thorough contradictory examinations in combination with the Veteran's history of treatment records and personal statements that support that the Veteran is not unemployable…have more probative value.

(R. at 15) (underline added); *See* (R. at 15-16).

As a result, Appellant's argument is not persuasive because, at most, Appellant argument is only based on his assessment of the record. However, it is the province and responsibility of the Board to weigh the credibility and evidence. As discussed above, the Board's weighing of the evidence in this case is within its purview as factfinder and should not be disturbed because it is supported by the record.

Based on the foregoing, Appellant has failed to identify any law or regulation that was wrongfully applied by the Board in its decision, nor does he offer any legal or factual challenge to demonstrate that the BVA decision is clearly erroneous. As a result, the Secretary respectfully submits that the Court should affirm the Board's plausible determination that Appellant was not entitled to a TDIU.

C. Miscellaneous

It should be noted that it is axiomatic that issues not raised on appeal are abandoned. *See Disabled American Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (BVA determinations unchallenged on appeal deemed abandoned); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all other issues that have not been addressed in Appellant's Brief should be deemed abandoned on appeal.

Additionally, the Secretary respectfully notes that he does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same, if the Court deems it necessary or advisable before its decision. *But cf. McWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. *See* 38 U.S.C. § 7261(b)(2). *See Shinseki v. Sanders,* 129 S.Ct. 1696, 1706 (2009) (noting that the burden of demonstrating prejudice on appeal "normally falls upon the party attacking the agency's determination").

CONCLUSION

WHEREFORE, Appellee respectfully requests that the Court affirm the BVA decision on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On 1/23/20, a copy of the foregoing was mailed postage prepaid to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Michael G. Imber
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